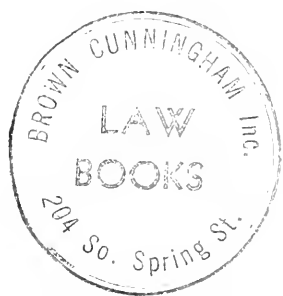




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ILLUSTRATIVE

CASES IN SALES

BY
PHILIP T. VAN ZILE
Dean, Detroit College of Law, Detroit, Mich.

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These cases have been selected, not as leading cases, but as illustrative cases, to be used in connection with my lectures before the law classes in the Detroit College of Law. It is not pretended that the subject of Sales has been covered by these cases, but simply that some of the principal subdivisions have been illustrated.

PHILIP T. VAN ZILE,

Dean, Detroit College of Law.

Detroit, Mich., Sept. 9th, 1896.

VAN ZILE SEL. CAS. SALES.

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(1) Every agreement that, by its terms, is not to be performed in one year from the making thereof.

(2) Every special promise to answer for the debt, default, or misdoings of another person.

(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

(4) Every special promise made by an executor or administrator to answer damages out of his own estate.

(5) Every contract for the sale of goods, wares, and merchandise for the price of \$50 or more shall be void unless the purchaser shall accept and receive part of the goods sold, giving something in earnest to bind the bargain or in part payment, or unless some note or memorandum of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

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ILLUSTRATIVE CASES

IN

SALES.

TOPLIFF et al. v. McKENDREE.

(50 N. W. 109, 88 Mich. 148.)

Supreme Court of Michigan. Oct. 30, 1891.

Error to circuit court, Wayne county;
George S. Hosmer, Judge.

Action by G. Francis Topliff and Charles B. Brooks against Edward J. McKendree for breach of contract to furnish plaintiffs 100 shares of Lake Superior Iron Mining stock at \$41 per share. The court directed a verdict in defendant's favor, and plaintiffs bring error. Affirmed.

Bowen, Douglas & Whiting, for appellants.
Conely, Maybury & Lucking, for appellee.

GRANT, J. Plaintiffs and defendant were stock-brokers, the former in Boston, the latter in Detroit. November 30, 1885, defendant wrote plaintiffs, in which, among other things, he said: "Lake Superior Iron Mining stock can be bought here at about 40 to 41 per share. If you can do anything at these figures, I can furnish some of the stock, say 100 to 200 shares." Some correspondence in regard to this and other matters, by letters and telegrams, followed, but which have no bearing upon the question at issue. December 3d, defendant wrote plaintiffs, stating: "I can furnish you 100 shares Lake Superior at \$41.00 per share, but with little or no profit to myself. Still, I will furnish you with the stock if you order it. Can ship it to you, I guess, with draft attached." This letter was received the morning of December 5th, and plaintiffs immediately replied as follows: "Your favor of the third is at hand, in which you offer us 100 shares Lake Superior Iron M. Co. at 41. Our customers are slow in buying the stock. We had a favorable offer for 25 shares to-day, but did not dare to sell, as we inferred from your letter that you did not care to break the lot. If you can sell us any part of 100 shrs., say 25, 50, or 75 shares, at 41, please wire us early Monday a. m., as our buyer may withdraw his bid. We hope to dispose of the whole lot early next week. State length of time at which your offer of stock is good." December 7th, two days after the receipt of the above letter, plaintiffs telegraphed defendant as follows: "We take 100 Lake Superior, 41. Forward draft attached." On the same day they wrote defendant, saying: "We wired you this a. m. as follows: 'We take 100 Lake Superior, 41. Forward draft attached,'—which we now confirm. We expect the stock Wednesday or Thursday." Re-

ceiving no reply from defendant, plaintiffs, on December 9th, telegraphed defendant: "No stock, letter, telegram from you. What does it mean? Explain at once by wire." To this telegram defendant replied by letter December 11th, saying: "Much to my regret, I am unable as yet to furnish that 100 shares of Lake Superior stock." He also stated his reasons for not furnishing it, and further stated that there was no doubt but that he could get it, as it had got to be sold, and expressed the hope that the matter would not put them to too great inconvenience.

I do not think this correspondence made a completed contract. The defendant did not bind himself to send the stock to Boston, nor did the plaintiffs bind themselves to accept it and pay for it in Detroit. No binding and completed contract could have been made otherwise than by the acceptance on the part of the defendant of the terms of the telegram of December 7th. McDonald v. Bewick, 51 Mich. 79, 16 N. W. 240; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Bowen v. McCarthy, 85 Mich. 26, 48 N. W. 155. The statement, "I guess I can ship it to you with draft attached," cannot be construed into an absolute offer to ship it. The manner and place of delivery were left open for future negotiation between the parties. Plaintiffs' letter of December 5th, and their own evidence upon the trial, show that they must have so understood it. On December 7th they had negotiated a verbal sale of the stock, but refused to complete it until defendant had confirmed their offer by telegram. Getting no reply from defendant by 3 o'clock p. m., they told their customer that they would sell him the stock. The letter of defendant of December 11th was not an acceptance of the plaintiffs' offer contained in their telegram of December 7th. That letter stated that he was unable to furnish the stock. The defendant did not then have the stock under his control. The owner was in New York, and the stock was in a Detroit bank as security. The owner refused to release it until he returned. All these facts were communicated by defendant to plaintiffs in his letter of December 11th. The statement that there was no doubt about getting the stock constituted no binding agreement on his part to procure it, and there is nothing else in the letter from which any contract could be implied. The court below properly directed a verdict for defendant. Judgment affirmed. The other justices concurred.

DEYO v. VAUGHN.

(55 N. W. 991, 97 Mich. 1.)

Supreme Court of Michigan. July 26, 1893.

Error to circuit court, Jackson county; Rollin H. Person, Judge.

Action by James C. Deyo against Sewell S. Vaughn for breach of warranty of a horse. Judgment for plaintiff. Defendant brings error. Affirmed.

Thomas A. Wilson, for appellant. Thomas E. Barkworth, for appellee.

LONG, J. Plaintiff, a dealer in horses, on April 14, 1891, wired defendant from New York, asking the price of a certain horse called "Golden Rod," then owned by defendant, at Jackson, this state. To this communication defendant replied by wire on the 16th, saying: "\$500 lowest for soft bay horse Golden Rod." Upon receipt of this message, and on the same day, plaintiff again wired defendant, saying: "Take him, blanket, girth, halter, if perfectly sound." The following day, April 17th, defendant wrote plaintiff, saying, in substance: "The horse is sound and right without fault. If you take him, it must be closed and the horse taken away without delay." April 19th the plaintiff wrote Mr. Hatch, at Jackson, requesting him to go to defendant, pay him \$500, and procure the horse in question, and ship him to New York. Two days after the defendant had written the letter to plaintiff, the horse, in being exercised by defendant's employe, struck and injured his left fore leg, which slightly lamed him. The defendant treated the limb by bathing it with liniment, which resulted in removing a portion of the hair. About a week after the writing of the letter by defendant, Mr. Hatch called at defendant's residence for the horse. At this time there was a bunch on the leg, produced by the injury, about the size of a half hickory nut. The defendant called Mr. Hatch's attention to the injury, and explained how and when it happened, and told Hatch he could do as he had a mind to about taking the horse. The next day Hatch called on defendant, received the horse, paid the consideration, and shipped it to plaintiff in New York. At the time the horse left defendant's stable he was not lame, and was sound and all right, except the bruise spoken of. The horse reached New York on the 26th, and on the following morning plaintiff claims to have discovered that this leg was badly swelled, and the horse lame. He was kept by plaintiff about two months, and then returned to defendant, in whose possession he remained over Sunday, and on Monday morning was sent back to plaintiff's barn, after which time defendant did not see him. July 15th thereafter this suit was commenced, based upon a warranty of soundness, and alleging a breach of such warranty.

The main controversy in the case is, was the injury to the horse one with which defendant could be charged under his contract

of warranty? It is claimed by defendant that the injury occurred after the title to the property had passed to plaintiff, and that therefore, he is not liable in this action; that the contract was completed at the date of the posting of the letter to Hatch. On the other hand, it is contended by the plaintiff that that contract was not completed until the delivery of the horse to Hatch. The court below held with the plaintiff upon the construction of the contract. The court was not in error in this interpretation of the contract. The plaintiff's proposition was to take the horse at the price named, if he was perfectly sound. Defendant accepted the terms of the proposition, but added: "If you take him, it must be closed and the horse taken without delay." It is said that there is no substantial variance between the terms of plaintiff's offer and defendant's acceptance; but there is a material difference. The acceptance left the question open to be determined by the plaintiff whether he would take the horse at once, and under it he was bound to decide whether he would comply with defendant's demand. The proposition of defendant was tantamount to saying: "I will take the \$500 you offer on condition only that you take the horse immediately. If you do not conclude to do so, I do not accept your terms." It is not true that under such circumstances the minds of the parties had met so that the contract was completed. Neither can it be said that the posting of the letter by plaintiff to Hatch completed it. Until the plaintiff had in turn notified the defendant that he would take the horse as defendant proposed, it was not completed; and this was not done until Hatch called upon the defendant, a week later. In any view of the case, the contract cannot be said to have been completed until that time. The defendant himself could have withdrawn the offer up to that time, and the plaintiff could have refused the offer. Defendant so construed it at the time Hatch called for the horse, telling Hatch he could do as he had a mind to about taking him away. It is evident from this that he did not then regard the sale as a completed one. It is the rule that, where an offer is by letter, the usual mode of acceptance is by sending a letter announcing a consent to accept. There are other modes of acceptance, which are equally conclusive upon the parties, but in the present case no letter was written to defendant accepting his proposition. Mr. Hatch, the agent of plaintiff, was directed to go to defendant, pay the money, and take the horse. He did not go until a week after, and at that time defendant might have said: "You have come too late. My proposition was an immediate delivery. The plaintiff cannot have the horse. He has not accepted my offer to take it without delay." If this position had been taken by the defendant, and he had refused to deliver the horse, no one would have claimed that plaintiff could have recovered him in an

action. To make a completed contract, the minds of the parties must meet; and, where a proposition is in writing, the acceptance must be absolute, and identical with the terms of the proposal. The authorities cited by defendant's counsel do not meet the case

presented by this record. This disposes of the main question, as we view it, in the case. There are other questions raised by brief of counsel for appellant. We have examined them, and find no error. Judgment affirmed. The other justices concurred.

TUTTLE v. CAMPBELL et al.¹

(42 N. W. 384, 74 Mich. 652.)

Supreme Court of Michigan. April 19, 1889.

Error to circuit court, Ingham county; PECK, Judge.

Assumpsit by Flora B. Tuttle against John F. Campbell and Martin Hanlon. Judgment for plaintiff, and defendants appeal.*Smith & York*, for appellants. *R. A. Montgomery*, for respondent.

CHAMPLIN, J. Some time in 1882 William A. Tuttle, who is the plaintiff's husband, engaged in the business of selling drugs and medicines at Williamston, Ingham county. He occupied a store which belonged to his wife, Flora B. Tuttle. In March of 1884 domestic dissensions caused a separation between Tuttle and his wife, and she left him and determined upon filing a bill of complaint to obtain a divorce from the bonds of matrimony. To save litigation over the question of alimony, he agreed to give her \$1,000, in full of all claims against him, to be paid when she obtained a decree for divorce, to secure which he gave her a certificate of deposit on the bank of Daniel L. Crossman, payable to her order when she should obtain a decree for divorce against her husband. The certificate was then left with Crossman for safe-keeping. This arrangement was so entirely satisfactory that the parties, on the same day or the next, laid aside their differences and went to living together again. The bill was not filed, neither was the certificate of deposit taken up or canceled with her consent. Harmony, however, did not long prevail in the Tuttle family. Dissensions broke out anew, and Mr. Tuttle, without her knowledge, obtained from Mr. Crossman possession of the certificate, and a short time thereafter she found it in his cash-drawer and took and retained possession of it. It appears that the date of the certificate was March 22, 1884, and when it was obtained Mr. Tuttle deposited \$500, and gave his note to Crossman, due in six months, for the other \$500. This note was not taken up when he became possessed of the certificate after the reconciliation, and there is no direct testimony that he then withdrew the \$500 cash which he had deposited, although there is a strong inference to that effect from Crossman's testimony. At any rate, in August Mrs. Tuttle held the \$1,000 certificate, and Crossman held Mr. Tuttle's note for \$500. At this time Mr. Tuttle told her that he had got to sell in order to pay Crossman that \$1,000, because he had to secure him at the time he got the certificate, and that she might come on Crossman if he did not settle, and so he had got to sell out to pay him. He finally told Mrs. Tuttle that if she would indorse the certificate of deposit to him she

could have a thousand dollars' worth of interest in the stock of drugs and medicines, which offer she accepted, and indorsed the certificate, and Tuttle delivered it up to Crossman on the 19th day of August, 1884, and Crossman canceled it and delivered up to Tuttle his note of \$500. There was some testimony tending to prove that Tuttle had occupied the store of Mrs. Tuttle over two years without paying any rent to her, and also had collected the rents of tenants occupying other portions of the building, for which he owed her, and that this indebtedness also entered into the consideration for the \$1,000 worth of interest in the stock of goods. After this transaction Mr. Tuttle continued to carry on the business until April 25, 1885, when he sold the entire stock of goods and fixtures to defendants for \$2,750, \$500 of which was paid in cash, and the balance in notes. The last one to mature, being for \$250, was made conditional upon defendants being able to obtain a lease of the store from Mrs. Tuttle. An inventory made soon after the purchase at the cost price showed the value of the stock to have been a little over \$3,160. The bargain was closed on Saturday night, and the next day Mr. Tuttle left the place and remained absent nearly two years without his whereabouts being known to Mrs. Tuttle. The sale was made without her consent. She had heard that the defendant Campbell was endeavoring to purchase, and he had inquired of her whether she would rent to him the store in case he should purchase, and she refused, and also, as she testifies, expressly notified him in that interview that she was the owner of a thousand dollars' interest in the stock of goods. This interview was about four months before the purchase by defendants. The defendant Hanlon had been a school-teacher in the village, and had heard that the domestic relations of Tuttle and his wife were not entirely harmonious. He was invited by Dr. Campbell to join him in making the purchase, and had been told by him that Mrs. Tuttle refused to rent the store to him, but it was not shown that he had express notice of Mrs. Tuttle's \$1,000 interest in the stock of goods when he purchased. A bill of sale was executed to them jointly by Tuttle, conveying the whole stock of goods then in the store. They thereupon went into possession, and continued the sale of drugs at retail, Mr. Hanlon giving his attention to the selling of the goods in the store. About 30 days after the purchase Mrs. Tuttle went into the store and found Mr. Hanlon there in possession, and stated to him that she had a thousand dollars' interest in the stock, and demanded that he turn out to her a thousand dollars' worth of the goods in the stock, or pay her \$1,000 for such interest. He absolutely refused to do either, and claimed that they had bought the whole stock and it was theirs. No demand was made upon defendant Campbell. This suit was then brought by plaintiff, alleging the

¹ Dissenting opinion of Sherwood, C. J., omitted.

conversion of her interest in the goods, but waiving the tort, and asking a judgment for their value in *assumpsit*. The trial resulted in a verdict and judgment for the plaintiff for the full amount of her claim, with interest from the date of demand.

Three objections were taken to the admission of testimony. We do not think the errors assigned upon them call for a reversal of the judgment upon any of the grounds stated against the admission of such testimony.

The main grounds of error relied on may be considered under the following heads:

First. Was the transaction between the plaintiff and her husband such a one as created them owners in common of the stock of goods?

Second. If they were such owners in common, would a purchaser from the husband of the whole stock, without notice of his co-owner's rights, acquire a title to the whole stock?

Third. If not, is the purchase by Dr. Campbell, with notice of plaintiff's ownership and the refusal to recognize the rights of Mrs. Tuttle by the defendant Hanlon, evidence of a conversion of the goods by both defendants, so as to sustain an action against both jointly?

Fourth. Where a small portion only of the goods are sold, the balance remaining in possession of the co-owners in common, who deny the right of another owner in common to any of the goods, can the dispossessed owner treat it as a conversion of the whole, and, waiving the tort, maintain an action of *assumpsit* to recover the value of the goods converted?

1. The owner of chattels may sell an undivided share or interest in them, and the relation thus created will be a common ownership, which, by analogy to such relations in real property, is frequently designated as tenancy in common of the property. In such case no actual delivery is required. The title passes at time of sale, if such is the intent of the parties. Both or either may have the actual possession of property owned in common, and when one owner has the actual possession, and the other has not, the owner in possession is simply the bailee of his co-owner's share. When an undivided share or interest in personal property is sold, there is no more objection to a designation of the interest sold by dollars' worth than there is by designating a part, as one-half, one-fifth, or any other fraction of the whole. In either case the part sold is a fraction of the whole, and extends to every part and parcel thereof. In one case the unit is the property; in the other, the unit is the value of the property. But the value represents the property, so that the units are in fact the same. The share conveyed measured by dollars' worth will depend, as regards quantity, upon the total value or worth of the whole property. And, in cases where the property is severable and capable of division in kind without sale, such share may be severed or separated from the

rest by taking so many dollars' worth, without regard to the quantity that is left, whether it be much or little, for the balance of the unit will be left after taking out the dollars' worth severed. Of course, a division is more readily made when the unit is the thing and the share is designated by a fraction of the quantity; but if the owners cannot agree upon the division, then the remedy is a sale, as in other cases. Dollars' worth is often used to measure and designate the share or ownership in property. More particularly is this the case in partnership transactions. No difficulty has been experienced in dividing up the property from the use of such standard as a measurement of interest. A sale of an interest in personal property must be supported by a sufficient consideration. In this case there was evidence of a present consideration passing from Mrs. Tuttle to her husband, which, if believed by the jury, was sufficient to support the contract. We conclude that the transaction between Mr. and Mrs. Tuttle was such as created them owners in common of the stock of goods.

2. This being so, he could not without her consent convey away her title to the goods to the defendant purchasers. So far as he retailed goods out of the store to customers, her consent would be implied by the course of dealing tacitly permitted by her, without objection. But a sale of the entire stock, being out of the ordinary course of business, would require her consent, in order to bind her or carry her interest to the purchaser. She testified that he had expressly agreed that he would not sell out the entire stock without her knowledge and consent, and that this sale was made in violation of that agreement. Owners in common of property have a right to dispose of their own undivided share, but such owner cannot sell the whole property, nor any portion thereof except his own; and if he undertakes to dispose of any larger interest his co-owners are not bound thereby. *Russell v. Allen*, 13 N. Y. 173 178, per *DIXON, J.*; *White v. Brooks*, 43 N. H. 492; *Welch v. Sackett*, 12 Wis. 243; *Frans v. Young*, 24 Iowa, 375. The principle is well settled that a seller of personal property can convey no greater title than he has, and it makes no difference that the purchaser has no notice and is ignorant of the existence of other parties in interest. *Cause v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158; *Trudo v. Anderson*, 10 Mich. 357; *Parish v. Morey*, 40 Mich. 417; *Pease v. Smith*, 61 N. Y. 477; *Beace v. Bowker*, 115 Mass. 129. Exceptions are found where, through the conduct of the party or by his laches, he is estopped from asserting title as against the innocent purchaser; but this case does not come within the exception. The fact that Hanlon had no notice of plaintiff's interest in the goods before he purchased from Mr. Tuttle is of no importance, and the rule laid down by the court, requiring that they should find as matter of fact that he had notice of her interest in order to entitle her to recover, was more

favorable to defendants than they were entitled to, and the question raised by defendants' counsel, that there was no testimony to support such finding, is of no consequence. By their purchase the defendants acquired title to that portion of the stock which their vendor had not sold to Mrs. Tuttle, and to that only, and they stood in the same relation to Mrs. Tuttle, respecting the ownership of the goods, as their vendor stood before their purchase, and were owners in common with her of the entire stock.

3. Ordinarily, when an owner in common sells the goods, the other owner in common may treat this act as a conversion, and bring an action of trover against his co-owner, to recover the value of his share; but he is not obliged to do this. He may retain his title in the goods in the hands of the purchaser, and if he converts them he is likewise liable therefor to his co-owner. What constitutes a conversion, short of a sale, is not definitely settled. A total destruction of the chattel, or a conversion of the whole to his own use, or something equivalent, such as a total denial of his co-owner's interest in the property, coupled with a total exclusion from possession, will render the owner in possession liable to his co-owner. Owing to the right which an owner in common has to the possession of property so owned, if the property is in its nature indivisible, mere refusal to yield possession of the property or admit to a joint possession, without denying the interest or ownership of his co-owner, will not constitute a conversion. I have no doubt that the claim set up of such exclusive ownership by Hanlon when demand was made upon him and his denial of, and his refusal to recognize, the rights of plaintiff, constituted a conversion of the plaintiff's interest in the property, so far as he was concerned. No demand was made of defendant Campbell, and none was necessary, if the testimony of Mrs. Tuttle is to be believed, and under the instructions of the court the jury have given credence to it. The law is laid down in Cooley, Torts, at page 528. (*451.) that: "One who buys property must, at his peril, ascertain the ownership; and, if he buys of one having no authority to sell, his taking possession in denial of the owner's right is a conversion." Dr. Campbell purchased knowing Mrs. Tuttle's right to the property, and in contravention of it purchased from Tuttle the whole property, without recognizing, but ignoring, her rights or title to any of it and took possession thereof under his bill of sale conveying the whole property with warranty. This was a conversion of her share in the property by him, and a demand before bring-

ing suit was unnecessary. The third question must be answered in the affirmative.

4. The general rule is that before a party can waive a tort for the conversion of personal property and bring *assumpsit* the property in the hands of the tort-feasor must have been sold and converted into money, upon the theory that the money has been received for the plaintiff's use. There is, however, another class of cases, where the property has been converted but not sold, where the tort may be waived and *assumpsit* brought for the value of the goods converted. This class belongs to those relations where a contract may exist and at the same time a duty is superimposed or arises out of the circumstances surrounding or attending the transaction, the violation of which duty would constitute a tort. In such cases the tort may be waived and *assumpsit* be maintained, for the reason that the relation of the parties out of which the duty violated grew, had its inception in contract. These relations are usually those of trust and confidence, such as those of agent and principal, attorney and client, or bailee and bailor. When an owner in common of personalty has the exclusive possession of the property he is a bailee of his co-owner's share. In such case there is a contract of bailment implied between the parties, the law implying a delivery from the nature of the case and the peculiar rights which one owner in common has to such property when reduced to his possession. He takes it and holds it upon the trust and confidence that he will care for it and use it, if he uses it, in an ordinarily careful manner, and will not sell or convert his co-owner's share to his own use. If he violates this trust and confidence by converting the property to his own use, his co-owner may bring trover for the conversion, or, waiving the tort, may sue in *assumpsit* to recover its value. This has been the settled law in this state for many years, and was explicitly declared in *Fiquet v. Allison*, 12 Mich. 328, which case is decisive of this. See, also, *Coe v. Wager*, 42 Mich. 49, 3 N. W. Rep. 248; *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. Rep. 256; *Evans v. Miller*, 58 Miss. 120. The facts of this case do not bring it within the principle above stated, and the action of *assumpsit* cannot be maintained.

The judgment must be reversed and a new trial granted.

MORSE and LONG, JJ., concur.

CAMPBELL, J., concurs in the result.

SHERWOOD, C. J., dissents.

* * * * *

McIVER v. WILLIAMS.
(53 N. W. 847, 83 Wis. 570.)

Supreme Court of Wisconsin. Dec. 6, 1892.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action originally brought by Anton Thiele against William M. Williams for the possession of personal property. On the death of Thiele, James Melver, as his administrator, was substituted as plaintiff. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiff, defendant appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Replevin for a span of horses, harnesses, and a wagon. The property was originally owned by appellant, Williams. One Thiele, plaintiff's intestate, in his lifetime, negotiated with Williams for the purchase of the property, and obtained possession of the same by virtue of such negotiations. It was claimed by plaintiff on the trial that Thiele in fact purchased the outfit for the agreed price of \$400, and that he was to have a few days' time to pay the purchase price. On the other hand, it was claimed by Williams that the price was agreed on in case of purchase, but that possession of the property was given by Williams to Thiele for the purpose of trial only for two days, which time Williams subsequently extended for another day. Thiele in fact kept the horses five days, paid no part of the purchase price, and Williams on the fifth day retook the property from the possession of Thiele's son, who was driving the team. Thiele brought replevin, and, upon his death before trial, Melver, his administrator, was substituted as the party plaintiff. The court directed a verdict for plaintiff, upon which judgment followed, and defendant appealed.

J. M. Clarke, for appellant. J. A. Eggen, for respondent.

WINSLOW, J., after stating the facts.) In order to justify the direction of a verdict for plaintiff, the court must have concluded that the uncontradicted evidence showed that there had been a sale of the horses and wagon upon credit, which had become absolute at the time of the recaption of the property by defendant. In this, we think, he was mistaken. The defendant gave his version of the transaction at length, and we think that a jury would be entirely justified in finding therefrom that no sale upon credit was in fact made, but that defendant simply allowed the intestate to take the horses a few days to try them, and agreed that, in case they were satisfactory after such trial, Thiele might purchase the entire property for \$400 in cash. If this was in fact the agreement, the defendant was entitled to retake the property, as he did, because payment would be a condition precedent, or at least concurrent, and the right of property would not pass until payment was made or waived, even though a delivery of the property, upon trial only, had been made. The defendant was entitled to have this question submitted to the jury. It appears that Thiele was garnished by several persons, as a debtor of Williams, on the day before Williams took possession of the horses, but that Williams was not served with process until several days afterwards. There is nothing in the record to show whether the garnishee actions referred in any way to an indebtedness supposed to arise from a purchase of the horses, or in fact whether the actions ever went to judgment. We cannot consider what the effect might be if in fact they did so to judgment against Thiele.

Judgment reversed, and cause remanded for a new trial.

LAMONT v. LA FEVRE et al.

(55 N. W. 687, 96 Mich. 175.)

Supreme Court of Michigan. June 23, 1893.

Appeal from circuit court, Bay county, in chancery; George P. Cobb, Judge.

Bill by Matthew Lamont against Frank La Fevre and wife and Michael Daily, to enforce a mechanic's lien. Decree for complainant. Defendants appeal. Affirmed.

McDonell & Hall, for appellants. Hatch & Cooley, for appellee.

HOOKER, C. J. Complainant, a material man, filed the bill in this cause against Frank La Fevre and Almira La Fevre, husband and wife, and Michael Daily, to enforce a mechanic's lien for material furnished for an hotel erected upon premises owned by Frank La Fevre. A contract to furnish material, erect and complete said hotel, was let by La Fevre to a firm of builders named Willis & Grant, who in turn sublet a portion to one Thompson. Thompson failed to perform, and negotiations were had whereby complainant furnished material which Thompson should have furnished. The principal dispute, so far as the facts are concerned, is over the question of defendant Frank La Fevre's liability to complainant for this material, the complainant asserting that it was furnished upon the request of La Fevre, accompanied by a promise to pay for the same the amount of complainant's bid. The defendants deny that La Fevre promised to pay for the material, and allege further that, if he did, the promise, being oral, would come within the statute of frauds as a promise to pay the debt of Willis & Grant, who were under contract obligations with Frank La Fevre to furnish the material. Upon the question of fact it is sufficient to say that we agree with the circuit judge that the complainant established the contract alleged, and that it was an original promise, and valid. It was not within the statute, for complainant did not sell to Willis & Grant, nor did they purchase the material from him.

A number of legal questions arise. It is contended that there was no meeting of minds, because no time appears to have been specified when the amount agreed upon for the material should be paid, but the rule of construction in such cases is that payment upon delivery is contemplated. The statement filed with the register of deeds was to the effect that the materials were furnished "in pursuance of a certain contract with Frank La Fevre," and that there was \$220 due, and a copy of this statement, with notice of filing, was served on Frank La Fevre only. The bill alleges two contracts,—one made on or about July 26, 1890, for \$400; and another, "that complainant should furnish for the building such materials as La Fevre might order from time to time, for which he (La Fevre) would pay, under which arrangement complainant furnished materi-

als to the amount of \$20." This sum of \$20 was rejected by the circuit judge, and, as complainant did not appeal, cannot be allowed here. It is mentioned because the defendants assert that it is the occasion of a variance between the statement, which mentions one contract, and the bill and proofs, which mention two; and it is contended further that the statement is excessive by this amount, and that the lien is therefore lost. It appears that the only reason for denying complainant any portion of his claim was the fact that in his statement of lien he did not say two certain contracts instead of one. By a mere technicality he is deprived of his security for \$20, although an honest claim. The case differs from those cited by counsel for defendants where persons wrongfully clouding debtors' titles with excessive liens are denied the benefit of the statute. The case of *Gibbs v. Hanchette*, (Mich.) 51 N. W. Rep. 691, carefully distinguishes between such cases and those where, through an honest mistake, too much has been claimed in the statement of lien, or by reason of a failure of proof the claimant was denied the entire amount claimed. We think this case is of the latter description. Under his pleading the court below declined to consider the \$20 item, and for reasons given we cannot allow him the amount here, if we should find the statement filed would permit it, about which we find it unnecessary to express an opinion.

A point is made over the matter of notice, defendant Almira La Fevre not having been served with notice. The object of a notice is to prevent the owner from paying the principal contractor, (Laws 1885, p. 297, § 5,) and in this case, as the contract was made with the owner, there was no necessity for a notice. The validity of a lien does not depend upon the notice. *Kirkwood v. Hoxie*, (Mich.) 54 N. W. Rep. 721. The building for which this material was furnished was an hotel, with a wing; the latter, used for a barber shop, being entirely on the west half of lot 11, while the former was on the west half of lot 12, of block 19, in Bay City. The proof shows that the timber was used in both, which were being erected together, and it is not an unreasonable assumption that both were contemplated when the contract was made. We think they should be treated as one parcel, as defendant evidently treated them, and that the lien attached to both.

The remaining question pertains to the homestead rights of Mrs. La Fevre. The defendants purchased the premises for a homestead before contracting, and moved upon them before the statement of lien was filed, with the design of making it their home. They thereby made it a homestead, and the fact that the building erected and in which they reside is an hotel made no difference. *Mills v. Hobbs*, 76 Mich. 122; *King v. Welborn*, 83 Mich. 199, 47 N. W.

Rep. 106. To the amount of \$1,500 it was exempt from this lien. Beyond that sum the lien attaches, and, as the premises cannot be divided, a sale affords the only means of reaching the excess. To hold that it could not be reached because indivisible would be to do violence to the plain intent of the statute, which, while it aims to afford every one a shelter, was not designed to enable him to defeat creditors by so constructing valuable property as to make it difficult to divide it. The decree of the circuit court will be affirmed, with costs. The other justices concurred.

CROSBY et al. v. DELAWARE & H.
CANAL CO.

(36 N. E. 332, 141 N. Y. 589.)

Court of Appeals of New York. Feb. 27, 1894.

Appeal from supreme court, general term, third department.

Action by Abel A. Crosby and others against the president, etc., of the Delaware & Hudson Canal Company for conversion of lumber. From a judgment of the general term (21 N. Y. Supp. 83) affirming a judgment for plaintiffs entered on a verdict, defendant appeals. Affirmed.

For former reports, see 5 N. Y. Supp. 949, mem.; 8 N. Y. Supp. 936, mem.; 13 N. Y. Supp. 306; 21 N. Y. Supp. 83; 23 N. E. 736; 28 N. E. 363.

F. L. Westbrook, for appellant. S. L. Stebbins, for respondents.

GRAY, J. This action which, for the third time, is brought to our attention, was instituted to recover the value of a quantity of lumber wrongfully taken and converted, as the plaintiffs allege, by the defendant. It had been transferred to plaintiffs by the firm of G. & E. Harnden in payment of an indebtedness. The Harndens were engaged in the business of boat building upon the Delaware & Hudson Canal, and in November, 1882, had contracted with the defendant to build two canal boats, during the coming winter, for delivery in the spring. In pursuance of an order from them, the defendant, subsequently to the making of the contract, delivered at their yard lumber of the quality and quantity requested. The contract between the parties as to the building of the boats contained no obligation as to the ordering or the supplying of any lumber. When the lumber was sent, the defendant forwarded to the Harndens one of their printed bills, or a memorandum with blank spaces to be filled in by writing, headed: "Rondout, N. Y., Nov. 24, 1882. Messrs. G. & E. Harnden to the Delaware and Hudson Canal Co., Dr.,"—and thereafter specifying the number of feet, the kinds, sizes, and prices of the lumber, and the sum of the indebtedness. In December following, the Harndens failed, and applied their various properties towards the discharge of the claims of creditors; transferring, as it has been said, this lumber to the plaintiffs by means of a bill of sale.

The defendant, claiming to have always retained its ownership of the lumber, introduced evidence for the purpose of showing that the lumber had been furnished to the Harndens only to be used in the boats contracted for; payment to be made for it by deduction of its value from the price of the boats upon their completion in the spring. It was shown that it was the custom for the defendant to furnish its own lumber to boat builders generally; but solely for the

purpose of being used in the construction of boats it had contracted for, and with the understanding that its cost was to be taken out when the boats were paid for. The evidence tended to show that this custom was known to the Harndens, and that, while in former years they had made cash payments for lumber obtained of the defendant, for some few years prior to this transaction, in November, 1882, they had maintained similar contractual relations with defendant in the building of boats, ordering lumber of the defendant for the purpose of being put into boats, and having its cost deducted from the contract price of the boats. The defendant has contended that the transaction between it and the Harndens in the furnishing of this lumber constituted a bailment, only, of the lumber, and not a sale, and that its title to it was never to be severed until the lumber was actually used in the construction of the boats. Upon the first trial the trial judge followed that view, and nonsuited the plaintiffs. When from that trial it came here, we held that, upon the evidence, whether it was a bailment or a sale of the lumber was a question for the jury to determine. We thought that the bill or memorandum sent with the lumber was some evidence that the transaction was understood as a sale, and that the custom of the defendant in supplying its lumber was not necessarily inconsistent with a sale. 119 N. Y. 334, 23 N. E. 736. Upon a subsequent trial the plaintiffs recovered a verdict, and when the case came here again, upon the defendant's appeal, the judgment was reversed, and a new trial ordered, because of error in the exclusion of evidence offered by the defendant in the testimony of the agent who sent the bill of sale or memorandum, however it may be termed, to explain the object or purpose in sending that paper. 128 N. Y. 651, 28 N. E. 363. The agent was the company's paymaster, whose duty it was to send out such bills or statements, and we held that his testimony to explain the meaning of the bill being sent to the Harndens was not objectionable as an attempt to vary any contract between the parties. It had been made use of by the plaintiffs as evidence of an admission by the defendant of there having been a sale of the lumber; and being, by reason of its informal character, consistent with either that view, or with the view that it was merely a statement advising the Harndens of what had been delivered under their order, and of what they would have to account for, it was proper that the defendant should have whatever benefit might result from an explanation by its agent of his object in sending it. Had the evidence, aside from this bill, established that there had been a sale, then the explanation of the purpose in sending the bill might have been improper. Such an instrument is usually deemed to be within an exception to the general rule of evidence, and, for its inform-

al and incomplete character, to be open to evidence in explanation and to throw light upon the contract between the parties. See Phil. Ev. (Cow. & H. and Edw. Notes,) 672; *Harris v. Johnston*, 3 Cranch, 311. Upon the last trial, the evidence of the company's agent in explanation of the purpose of sending the bill in question was admitted, and was to the effect that it was sent upon this occasion to the Harndens as it had been sent to them upon previous dealings, and, in accordance with the company's universal custom, to other parties, "as a memorandum of the lumber that they had, and as a memorandum of the amount that had to be deducted from the contract price of the boat when the company settled for it," and that it was not sent for any other purpose. With that explanation of the company's agent, in connection with some testimony by other boat builders that the company furnished lumber to all of them upon the same terms, and for the sole purpose described by the company's agent, the defendant's counsel insists that the case was so complete for the defendant as to have made it the duty of the trial judge to decide the question, as one of law, in favor of the defendant, and to have nonsuited the plaintiffs. That the evidence preponderates in favor of the defendant's contention as to what the transaction amounted to cannot be doubted, and, as we have said upon the previous occasions when the case was under review, we again say that the equities militate, and the evidence tends, strongly against the claim of the plaintiffs. It is difficult to understand how the jury could have come to the conclusion which they did upon any fair and conscientious consideration of the proofs; but we cannot say that the case had been wholly removed from their province, and, if not, then we cannot interfere with their decision of the issue. It does not follow that, with the evidence of the company's agent in the case, however strongly supporting the company's position, the plaintiffs were foreclosed from insisting upon the inconclusiveness of the evidence relied upon by the defendant, or upon certain opposing inferences being possible from the proofs, and that it was the province of the jury to consider and decide. Nor was anything else to be inferred from our previous opinion than that the evidence of the company's agent was admissible in its behalf upon the issues, in view of the use made of this bill by the plaintiffs, and to explain the object in sending it. However convincing the evidence, to the ordinary mind, that the defendant was right in its contention, it cannot be said that the facts depended upon were incapable of another aspect, or that, from the circumstances out of which they grew, and which bore upon the relations of these parties, it was impossible to infer that this transaction was not a sale of the lumber. It is the undoubted rule that in such actions the plaintiff must establish his

title to, and right to the possession of, the property alleged to have been wrongfully converted; and this was undertaken in this case. The Harndens were in possession of the lumber, and apparently, from the bill rendered, were indebted for it as upon a sale to them, and they had transferred it to plaintiffs by a bill of sale. It appeared that the Harndens had previously bought lumber of the defendant for cash, and that, after an interview between a member of that firm and an officer of the company, the course of dealing was changed, and credit was given to them for lumber ordered and delivered. With lumber so obtained, boats of other parties were repaired, and there was no proof that any restrictions were imposed upon its use. Nor did it appear that anything was said or written as to the title to this lumber being only conditional in the Harndens. Though its cost was to be received by the defendant only when the boats were built, and then by way of deduction from the sum contracted to be paid for the boats, that was not necessarily conclusive upon the question of the ownership meanwhile, for the title to an article may pass upon a credit sale, if such be the intention of the parties. Another circumstance was that the company was not bound to accept and to pay for the boats until after inspection and approval; thus introducing another element of possible doubt into the question of title. All these circumstances, and some others of more or less importance, were open to the consideration of the jury, in connection with the form of the bill for the lumber sent by the company's agent; and, as it has been already intimated, however strong may seem the inference to our minds that there was only a conditional sale or a bailment of the lumber, a different inference was permissible; so that, under the well-settled rule, the jury became the proper judges between the litigants, and their decision closes the dispute, in the absence of any errors committed in the course of trial which would authorize us to order a new trial.

The defendant's counsel requested the trial judge to charge "that if the jury find that the evidence given by Larter that the bill sent to the Harndens November 24, 1882, was sent only as a memorandum of the quantity and of the quality of the lumber, and its value, is true, the bill is not an admission that the lumber was sold to the Harndens,"—to which request he replied: "I decline to charge in those words, and will leave it as a question of fact, under all the evidence, for the jury to determine whether or not the lumber was sold." We think there was no error in this. Larter was the company's paymaster, and had testified that the bill had been sent as previous ones had been sent, namely, as a memorandum to show the amount to be deducted from the contract price of the boats when constructed. The effect of that evidence upon the bill was for

the jury to decide. It was not legal error for the court to refuse to say what would become of certain evidence if certain other evidence was believed; nor was the court bound to put the proposition to the jury, if we assume its truth, as it was formulated by the counsel. *Conley v. Meeker*, 85 N. Y. 618. Therefore, when, in his reply to the request, the trial judge simply relegated the whole matter to the jury, to be decided upon the evidence before them, he committed no error. In his charge he remarked that "the intention with which a thing is done does not always control the legal effect of the thing done." That is very true, and did not prejudice the defendant's case. That object which one may propose to himself in entering upon some transaction often fails of its accomplishment by the operation and intervention of rules of law. The judge sufficiently explained the bearing of the remark. When subsequently, upon the request of the defendant's counsel, he instructed the jury that the minds of contracting parties must meet to make a valid contract, that the question was one for the jury as to what the contract was, and that "if, from the circumstances, you are satisfied that it was the intention of both parties at that time that the title should pass,—that their minds met upon that,—then you may treat it as a sale; if, from the circumstances, you

do not believe that the parties' minds met, you may treat it as no sale,"—he made it clear enough what part intention played in the transaction of the parties, and there should have been no confusion in their minds about it.

The trial judge refused to charge "that the intent of Larter as to the sending of the bill, * * * if Larter is believed by the jury, does determine the legal effect of the sending of the bill." This was not error. As it has been said, Larter was following the usage in previous transactions, and though his own intention in sending the bill in that form may, nevertheless, have been to treat the matter as a bailment, and the bill as a mere memorandum, that could not control the real arrangement, if it was otherwise; and what that was the facts and circumstances, taken all together, must be considered and weighed, for the absence of any definite agreement upon the subject in words or in writings. We have scrupulously considered these and other rulings upon requests to charge, and upon the admission and exclusion of evidence, and we are not able to say that there exists any error which would justify us in permitting the defendant to submit its case to the chances of another trial. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

IRONS v. KENTNER.

(50 N. W. 73, 51 Iowa, 88.)

Supreme Court of Iowa. April 26, 1879.

Appeal from circuit court, Tama county.

Action against C. H. Kentner to recover the value of wheat deposited by plaintiff and one Armstrong, who subsequently assigned his interest to plaintiff, in defendant's elevator, and there destroyed by fire without defendant's fault. The receipt given Armstrong and plaintiff when the wheat was delivered was as follows: "Bought of T. K. Armstrong, for C. H. Kentner, to be delivered at his elevator, according to sample, wheat No. 3, at owner's risk as to fire." A memorandum of the quantity of wheat was on the back of the receipt. It was admitted at the trial that it was the custom to mix wheat when delivered at the elevator, and return owner's wheat of like quality, and to charge storage when the wheat remained in the elevator more than a month. Judgment for plaintiff. Defendant appeals. Reversed.

A. W. Guernsey and O. H. Mills, for appellant. W. H. Stivers, for appellee.

ROTHROCK, J. The question we are required to determine is whether the transaction between the contesting parties constituted a sale of the wheat or a mere bailment. The evidence shows that the wheat in question was not deposited in a common bin with other wheat, but that it was placed in a separate bin, where it remained unmixed with other grain until it was destroyed by fire. It further appears that no demand was made for the wheat by the plaintiff or Armstrong previous to the fire, but that the defendant, by his agent, offered the plaintiff 95 cents per bushel on the Saturday before the fire. In *Johnston v. Browne*, 37 Iowa, 200, the ticket or memorandum given by Browne on receiving the grain in the elevator was in these words: "Bought of H. T. Pickett, for W. P. Browne, to be delivered at Browne's elevator, if all like sample — of wheat, at \$——, in store, ——— buyer, ——— bushels, ——— lbs." It was shown in that case, by extrinsic evidence, that the understanding of the parties was that Browne, the proprietor of the elevator, was to ship and sell the grain on his own account, and, when the depositor desired to sell, Browne was to pay the highest price for the grain, or return a like quantity and quality. That transaction was held to be a sale, and not a mere storage or bailment of the grain. In *Nelson v. Brown*, 44 Iowa, 455, the ticket or memorandum delivered to

the depositor of the grain was in these words: "Received of C. C. Cowell, for Thompson, in store, for account and risk of C. C. Cowell, one hundred and eighty-three bushels No. 3 wheat. Loss by fire, heating, and the elements at the owner's risk. Wheat of equal test and value, but not the identical wheat, may be returned." It was held in that case that so long as the wheat remained in the elevator, though thrown in a common bin with wheat of like quality, the transaction was a mere bailment. It is there said: "But the warehouseman is not under obligation to retain the wheat of the depositor in his warehouse. He may, without breach of contract, and without being guilty of conversion, ship the wheat away on his own account. When he avails himself of this privilege, the character of the transaction and the relation of the parties change." In the case at bar the ticket or memorandum expresses no completed contract upon its face. In this respect it is unlike the contract in *Marks v. Elevator Co.*, 43 Iowa, 146, where it was held the contract could not be explained by parol evidence, because it was complete in its terms. In this case no action can be maintained upon the instrument without the aid of extrinsic evidence. Parol evidence is necessary to fix the price agreed to be paid if it should be held to be a contract of sale, and, whether a sale or mere bailment, parol evidence is necessary to explain the figures indorsed on the instrument. It was admitted the grain was delivered in pursuance of the alleged custom or usage, and it was shown that it was in the elevator in a separate bin when it was burned, and that the defendant offered to purchase it on the Saturday before the fire. These facts, when taken in connection with the ticket, show clearly that the transaction was not a sale, but a bailment. It is true that the word "bought" in the ticket, unexplained, would import a sale, but, when taken in connection with the expression "at owner's risk of fire," and in the light of the parol evidence, it clearly appears that a sale was not contemplated by the parties. "At owner's risk of fire" evidently means that, so long as the wheat should remain in the elevator, the plaintiff should bear that risk. If it was a sale, it is not at all probable that any such words would have been used. In such case, the warehouseman would have assumed the risk without any stipulation to that effect.

We think the case is clearly within the rule of *Nelson v. Brown*, supra, and that, as the identical wheat remained in the elevator, and was consumed with it, the defendant is not liable. Reversed.

STURM v. BOKER et al.
(14 Sup. Ct. 99, 150 U. S. 312.)

Supreme Court of the United States. Nov. 20, 1893.

Appeal from the circuit court of the United States for the district of Indiana. Reversed.

Solomon Claypool and John M. Butler, for appellant. Albert Baker, Wm. D. Guthrie, and C. A. Seward, for appellees.

Mr. Justice JACKSON delivered the opinion of the court.

This suit, as originally instituted, was an action at law by the appellant, in the superior court of Marion county, Ind., against the defendants, to recover the sum of \$238,000, with interest thereon, for which sum, the plaintiff alleged, they were indebted to him. The defendants, being citizens of New York, removed the cause to the circuit court of the United States; and, as the claim involved various matters of account, running through a period of several years, the court, on motion of the defendants, transferred the cause to the equity docket, and required the plaintiff to reform his pleadings. In compliance with this order, the plaintiff filed his bill of complaint, setting forth various transactions involving matters of account between himself and the defendants, commencing in September, 1867, and continuing down to September, 1876. The answer of the defendants admitted many of the facts charged, and either denied others, or set up new matter in avoidance thereof.

The several items of account presented by the pleadings need not be specially mentioned, or separately considered, nor is it deemed necessary, in the view we entertain of the case, to review the immense volume of testimony taken in the course of the litigation,—covering about 4,000 printed pages,—involving irreconcilable conflicts, and including much that is wholly irrelevant. The material facts are clearly established by the written agreement of the parties, and by the admissions made in the pleadings; and the controlling question of law arising thereon, and upon which the correctness of the decree dismissing the bill must be determined, is whether the court below placed the proper construction upon the original contract entered into between the parties, under which the defendants consigned certain arms and munitions of war to the complainant, to be by him shipped to, and sold in, Mexico. That contract, after some previous verbal negotiations, was embraced in the following correspondence:

"Office of Hermann Boker Co., No. 50 Cliff Street.

"New York, September 18th, 1867.

"General H. Sturm, present.

"Dear Sir: Inclosed please find our bill of sundry arms, etc., amounting to \$39,887.60, for which amount please give us credit on consignment account.

"As mutually agreed, we consign these arms to your care, to be shipped to Mexico, and to be sold there by you to the best advantage. Should these arms not be disposed of at the whole amount charged, we have to bear the loss. Should there be any profit realized over the above amount of bill, such profit shall be equally divided between yourself and us.

"Also, it is understood that all these goods are shipped by you free of any expenses to us, and that, in case all or any of them should not be sold, they shall be returned to us free of all charges.

"As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of \$40,000 transferred to us. Please acknowledge the receipt of this, expressing your acquiescence in above, and oblige,

"Yours, truly, Hermann Boker & Co."

Accompanying this letter was an invoice, in form as follows:

"No deduction allowed for errors or damages unless claim is made within five days after the goods are received.

"Herman Funke. Folio ———.

"F. A. Boker.

"50 Cliff Street, New York,

"F. Schumacher. Sept. 18th. 1867.

"Mr. H. Sturm in joint acc't with Hermann Boker & Co.:

"Payable in gold.

"Terms, net cash.

"Forwarded for your account and risk, per ———:

1 12-pounder battery, brass, complete.....	\$ 9,000	
1 3-rifled battery, iron, complete.....	8,000	\$17,000
73 cases of 20 ea. } 1,470 Springfield R. mus- 1 " 10 " } kets, 8.00... \$11,760	259	12,019
74 cases, 3.50.....		
1,000 r'ds fixed ammunition, 12 p., 2.00.....	\$ 2,000	
504 r'ds fixed ammunition, 24 pd., 2.00.....	1,008	
200 boxes:		
100,000 Enfield cartridges, 12.00	1,200	
100 boxes:		
200,000 Maynards, 20.50.....	4,100	8,308
200 boxes:		
670 perc. shell, 3 Hotchkiss, 1.25.....	\$ 837 50	
680 time fuse, 3 Hotchkiss, 1.25	850 00	
270 case shot, 3 " 1.55	428 50	
180 canister, 3 " 1.00	180 00	
153 boxes, painted, 150.....	229 50	
27 " not painted, 130.....	35 10	
		2,560 60
		\$39,887 60"

To which complainant replied:

"New York, Sept. 26th, 1867.

"Messrs. Hermann Boker & Co.

"Gents: I have the honor to acknowledge the receipt of your letter of the 18th inst., in

which you inclose bill of sundry arms, amounting to \$39,887.60, consigned to me upon certain conditions contained in said letter.

"In reply, I have to say that I accept the terms of said conditions of consignment, and, as soon as I obtain the policies of insurance upon said goods, will transfer them to you.

"Very respectfully, your ob't servant,

"H. Sturm."

There was another consignment, the terms of which are contained in the letters of October 24, 1867, as follows:

"New York, October 24th, 1867.

"General H. Sturm, present.

"Dear Sir: Inclosed we beg to hand you our bill for muskets, amounting to \$10,175, for which please give us credit on consignment account.

"As mutually agreed we consign these arms to your care, to be shipped to Mexico, and to be sold there by you to the best advantage.

"Should these arms not be disposed of at the amount charged we have to stand the loss. Should there be any profit realized over the above amount, such profit shall be equally divided between yourself and us.

"It is also understood that these goods shall be shipped by you free of any expenses to us, and that, in case they should not find a ready sale, they shall be returned to us free of all charges.

"Please attend to the insurance of this lot, and have the amount transferred to us in one policy; also, please acknowledge the receipt of this, stating your acquiescence in above. We likewise beg to hand you inclosed the San Francisco draft of Placido Vega, \$63,699.60 gold, with protest and power of attorney to collect, with legal interest, same attached. We will allow you a commission for collecting this draft and interest for us, of ten per cent. off the amount.

"Be kind enough to acknowledge the receipt of this draft.

"Wishing you a pleasant trip, and prosperous affairs, we beg to remain,

"Yours, truly,

[Signed] "Hermann Boker & Co."

"New York, October 24th, 1867.

"General H. Sturm.

"Dear Sir: We beg to refer to our annexed letter, contents of which we expressed according to our mutual agreement. We now beg to say, in order to avoid any misunderstanding hereafter, that with regard to the two lots of new Springfield rifles shipped to your care, viz.

"1,470 and 74 cases and

"1,000 " 50 "

we should direct as follows:

"Should these mentioned arms not bring the prices as charged by us, viz. \$8.00 apiece for the first and \$10.00 apiece for the second lot, then we would respectfully request you

to have them returned to us free of expenses, as agreed.

"Please express your acquiescence in above and oblige,

"Yours, truly,

[Signed] "Hermann Boker & Co."

The invoice which accompanied this last consignment is as follows:

"Office of Herman Boker & Co.,

"No. 50 Cliff Street, New York.

"October 24, 1867.

"H. Sturm, Esq., N. Y.:

"Bought of Herman Boker & Co., in joint account,

"50 cases containing:

1,000 new Springfield muskets @ \$10.....	\$10,000
50 cases @ \$3.50.....	175
	<u>\$10,175</u>

While it is clearly established that both of these consignments were made upon the same terms and conditions, the invoices which accompanied them differed in some respects. The bill accompanying the October consignment was entirely in writing, while the invoice accompanying the September consignment was written under a printed billhead of the defendants. The printed heading was not changed, except by erasing the words, "bought of," and inserting in their place the words, "Mr. H. Sturm in joint a/c't with." The words, "Payable in gold," appear to have been stamped on the bill, but whether this was done at the time of its delivery to the complainant, or subsequently, when the defendants regained possession of the bill, is a question of dispute between the parties; and under the testimony it is a matter of grave doubt whether they formed a part of the invoice bill, as originally rendered, but it is not deemed necessary to determine this controverted question of fact.

The October consignment, which was insured by the defendants themselves, and was shipped by the steamer Wilmington, reached Mexico safely, and causes no controversy between the parties except as to a portion of the proceeds arising from the sale thereof, which was received by the defendants.

The September consignment, together with similar goods of the value of \$169,516, belonging to the complainant, were shipped on the schooner Keese and brig Blonde. The Blonde carried of the consigned goods, \$10,560.60, and of the complainant's goods, \$17,250, while the Keese carried of the consigned goods, \$29,327, and of complainant's goods, \$152,266.

The goods shipped on both vessels were insured in 14 separate policies. These policies were made out in the name of Sturm, "for account of whom it might concern." The whole amount of insurance on the goods carried by the Blonde was \$30,000, while the total insurance on the goods, individual and consigned, carried by the Keese, was \$163,000. This insurance was effected

through an insurance broker, who was informed that the defendants had an interest of about \$40,000 in the goods to be covered by the policies, and who was directed to consult Mr. Funke, the member of defendants' firm with whom the complainant had chiefly conducted the transaction in controversy, as to how those policies should be made. This he did, and with the consent, and by the direction, of Mr. Funke, he took the whole lot of insurance together, in the name of complainant, "for account of whom it might concern," and appropriated for the benefit of the defendants, and handed over to them, by the instruction of the complainant and of Funke, four policies on the cargo of the Keese amounting to \$55,000, issued, respectively, by the Sun, the New York, the Orient, and the Mercantile Insurance Companies, and one policy for \$15,000 issued by the United States Lloyds Insurance Company on the cargo of the Blonde. These four policies on the Keese, together with the one on the Blonde, the insurance broker selected for the defendants at their request, as being issued by good companies, and they were delivered to the defendants about the date of their issuance.

The policies thus delivered to them, as understood by the broker who selected and turned them over to the defendants, were intended to cover their interest in the insured cargo of the Keese and Blonde. The amount of the policies so delivered to defendants was in excess of the invoice prices of the consigned goods, for the reason, as alleged, that policies covering the exact amount could not be selected, but with the understanding that the excess was to be held for account of the complainant.

The vessels carrying the cargo sailed for Mexico in September, 1867,—a few days after the insurance was effected. On the voyage the Blonde was caught in a storm, and part of her cargo was thrown overboard to save the vessel. The insured goods had to contribute to the general average the sum of \$1,463.84, which was paid by the complainant, who also paid out the further sum of \$672.78 for repairing part of the consigned goods, which reached Mexico in a damaged condition. Half of the amount paid on general average, and the amount paid for repairs upon the consigned goods, are the only items of account in controversy, so far as concerns the shipment made upon the Blonde, nothing having been recovered, either by complainant or defendants, upon the insurance policies taken out on the cargo which she carried. That shipment, except in respect to the items paid on general average and for repairs, may therefore be dropped out of further consideration.

The Keese, carrying \$29,327 of the consigned goods, and \$152,266 of complainant's individual goods, and covered by 12 policies of insurance, amounting to \$163,000, was wrecked on her voyage, without fault or

negligence on the part of complainant, and her cargo was totally lost.

The complainant had reached Havana, on his way to Mexico, when he learned of the loss of the Keese and her cargo, and promptly notified the defendants, by telegram, of the fact. The defendants thereupon called for and received from the complainant's agent in New York city the invoice which accompanied the consignment of September 18, 1867, for the purpose of preparing and making proof of the loss. The insurance companies refused to pay the policies, on various grounds, which need not be noticed here.

The complainant returned to New York in March, 1868, and, learning that the insurance companies contested their liability for the loss, arranged with the defendants to institute suits against the companies to recover on the policies held by them, respectively. The defendants employed Mr. Da Costa to sue upon the policies held by them, while the complainant employed Mr. Parsons to sue upon his, and the lawyers were to co-operate and assist each other in the prosecution of all the suits.

About the time this arrangement was made, the complainant opened a bank account with the defendants, and thereafter made deposits with and drew checks and drafts upon them, as his bankers, down to the latter part of 1875.

The litigation against the insurance companies continued until September 13, 1876, when the last collection upon the policies was made. During the progress of the litigation, the complainant turned over, or assigned, to the defendants such judgments as he had obtained, and such policies standing in his name as had not been reduced to judgment, as alleged, for the purpose of convenience in collection and settlement, and with the view of having the amounts collected thereon placed to his credit. The funds collected upon all the policies, amounting to about \$109,000, went into the hands of the defendants. The complainant claims that his interest and that of defendants in the amounts recovered is in the ratio of \$152,266 to \$29,327,—that being their relative proportion in the total amount of insurance,—and that the defendants ought to account to him according to that proportion, and pay their just share of the expenses incident to the collection thereof, as well as compensate him for his services in connection with the suits. These, and other smaller items of account, constitute the matters in controversy.

While admitting the general facts in respect to the transaction, the defendants set up in their answer that by the terms of the contract the complainant became the insurer of the goods, and was bound thereby to either sell them in Mexico, and account for the proceeds, or to return them to New York free of all expense to the defendants, and that, recognizing such liability, the com-

plainant insured all the goods, making no distinction in the manner of such insurance between his individual goods and the consigned goods, and that the policies transferred to the defendants by the complainant were transferred as collateral security for the performance of the contract, which was upon a gold valuation, and that no part of the policies was held in trust for the complainant.

On this theory, the defendants kept their account of the transaction in the name of the "Mexican Arms Account," in which the goods consigned were charged at the price of \$39,887.60, and to this was added the premium upon gold at 45 per cent., amounting to \$17,949.42; and, on the aggregate of these two sums, interest was computed from September, 1867, to May 1, 1882, amounting to \$53,801.28. This account was also charged with the expenses connected with the suits on the policies turned over to them, amounting, with interest, to \$16,710.72. These expenses consisted of attorneys' fees and sundry outlays for witnesses in connection with the suits. These various items were not charged or entered as debits against Sturm until 1876, when they were transferred from the Mexican arms account to his account.

The defendants' construction of the contract, and method of keeping the account, was not communicated to the complainant until some time in 1876, when he promptly denied its correctness. The court below adopted the defendants' interpretation of the contract, holding that the consigned goods were at the risk of complainant; that he was responsible for their loss, although arising from inevitable accident, because he had undertaken to return them if not sold; and that, being so responsible, the defendants had a right to charge him with the value thereof, and treat the policies turned over to them as collateral security for this liability, and were, furthermore, entitled to charge him with the expenses of collecting such policies, so that the complainant was entitled to credit only for the net amounts collected thereon. For this, and the further reason, as the court assumed, that the complainant had given testimony in the insurance cases, and made admissions under oath, which were inconsistent with his present claim, and which should repel him from a court of equity, his bill was dismissed.

If, by the terms of the contract, as embodied in the letters of September 18 and October 24, 1867, the title to the goods vested in the complainant, or they were to be at his risk during their transit to Mexico, then it is conceded that upon an adjustment of the accounts between the parties on that basis, with the allowance to the defendants of a premium of 45 per cent. for gold, there is little or nothing due to the complainant, and no substantial error in the decree dismissing his bill. On the other hand, if the title to the goods delivered did not vest in the com-

plainant under the terms of the consignment, or he was not responsible for the loss of the same by inevitable accident, then the court below was in error in dismissing his bill, and denying the account sought.

It is too clear for discussion, or the citation of authorities, that the contract was not a sale of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words "consign" and "consigned," employed in the letters, were used in their commercial sense, which meant that the property was committed or intrusted to Sturm for care or sale, and did not, by any express or fair implication, mean the sale by the one, or purchase by the other. The words, "Mr. H. Sturm in joint account with Hermann Boker & Co.," or "Bought of Hermann Boker & Co. in joint account," in the billhead, cannot be allowed to control the express written terms contained in the contract, as set forth in the letters. A printed billhead can have little or no influence in changing the clear and explicit language of the letters, and it in no way controls, modifies, or alters the terms of the contract. The purpose and object of the bill were to give a description and valuation of the articles to which the contract, as embraced in the letters, had reference; their description being important, if the articles had to be returned, and their price or valuation necessary, if they were sold, and profits were made for division. The contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well-settled rule, control, modify, or alter it. That the invoice was not intended to have that effect is shown by the fact that the invoice of the consignment of October 24th differed in several respects from the invoice of September 18th, although the terms and conditions in respect to each consignment were the same.

In *Schenck v. Saunders*, 13 Gray, 37, there was a written agreement in these terms:

"The said Schenck, Wood & Pond, of the first part, agree to furnish the stock, consisting of upper and sole leather and linings and bindings, of sufficient amount to make at least eight, and not to exceed twenty, cases per week. And the said Charles Howe, of the second part, is to take the stock, and make it up, to the best of his abilities, into women's boots, and further agrees to consign all the goods he makes to the said Schenck, Wood & Pond, of the first part, to be sold by them on commission of five per cent.; the goods to be sold for cash, and the returns made to the said Charles Howe as fast as made. And the said Charles Howe, of the second part, agrees to put up and ship to the said Schenck, Wood & Pond, at their store in New York, at least eight cases of boots per week, each case containing sixty pairs, commencing the first week in May, 1866."

With each shipment of leather to Howe, Schenck, Wood & Pond sent him unsigned

bills, like those in the present case, in this form:

"Boot, Shoe and Leather Warehouse.

"New York, May 15, 1856.

"Mr. Charles Howe,

"Bought of Schenck, Wood & Pond,

"Manufacturers and Commission Merchants,

"No. 25 Beekman Street.

"Terms 6 months.

"52 sides, sole leather B. A., 644, 26½.... \$170 66
"Inspection and cartage..... 90

"\$171 56"

In a contest as to the title of these goods (boots) between Schenck, Wood & Pond and an assignee of Howe, it was contended, among other things, that the invoices showed that the transaction was a sale to Howe, and the heading of the bills was relied upon to give such construction to the contract. The supreme court of Massachusetts, speaking by Bigelow, J., held that the transaction was not a sale, and that "the bills of parcels which were sent from time to time with the merchandise were susceptible of explanation by parol evidence, and did not change the terms of the written agreement under which the property was sent to Howe. They were sent only as memoranda of the amount and value of the merchandise transmitted. *Hazard v. Loring*, 10 Cush. 267."

"An invoice," as said by this court in *Dows v. Bank*, 91 U. S. 630, "is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods, or price of the things invoiced, and it is as appropriate to a bailment as a sale. Hence, standing alone, it is never regarded as evidence of title."

Was the contract, as claimed by counsel for the defendants, a contract of "sale or return?" We think not. The class of contracts known as contracts of "sale or return" exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser, subject to his option to return the property within a time specified, or a reasonable time; and if before the expiration of such time, or the exercise of the option given, the property is destroyed, even by inevitable accident, the buyer is responsible for the price.

The true distinction is pointed out by Wells, J., in *Hunt v. Wyman*, 100 Mass. 200, as follows: "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined. In the other, the property passes at once, subject to the right to rescind and return."

The cases cited and relied on by the defendants (*Moss v. Sweet*, 16 Q. B. 493, 494; *Mar-*

tineau v. Kitching, L. R. 7 Q. B. 436, 455; *Schlesinger v. Stratton*, 9 R. I. 578, 581) involved contracts of "sale or return," in which there was a sale followed by a destruction of the property before the option of the purchaser had expired, or had been exercised. It was properly held in these cases that the goods were at the risk of the purchaser pending the exercise of the option, and that he was responsible for the loss of the goods, or the price to be paid therefor. These authorities are not in point in the present case.

The contract under consideration did not confer upon the complainant the privilege of purchasing or returning the goods within any specified or reasonable time, for the defendants retained, by express stipulation, a right to share in the profits made on the sale of the goods in Mexico, and, if they were not sold, to have the specific goods returned to them without expense. In the letter of October 24th, they specially direct that the Springfield rifles, including those covered by the consignment of September 18th as well as those covered by the consignment of October 24th, should be returned if they did not realize the prices indicated in the invoices.

The contract, in its terms and conditions, meets all the requirements of a bailment. The recognized distinction between bailment and sale is that, when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed. The transaction is a sale. This distinction or test of a bailment is recognized by this court in the case of *Powder Co. v. Burkhardt*, 97 U. S. 116.

The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title. An essential incident to trust property is that the trustee or bailee can never make use of it for his own benefit, nor can it be subjected by his creditors to the payment of his debts.

Testing the present case by these established principles, it admits of no question that the contract was one of bailment, and that the title to the goods, with the corresponding risk attached to ownership, remained with the defendants. Suppose a creditor of Sturm had levied upon or seized these goods after they reached his possession. It cannot be doubted that the defendants could have recovered them as their property.

That the contract between the parties in reference to the goods in question was a bailment upon the terms stated in the letters is clearly established by the authorities. Among others, see *Hunt v. Wyman*, 100 Mass. 198; *Walker v. Butterick*, 105 Mass.

237; *Middleton v. Stone*, 111 Pa. St. 589, 4 Atl. Rep. 523.

The complainant's common-law responsibility as bailee exempted him from liability for loss of the consigned goods, arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking.

This brings us to the question whether, by the terms and conditions of the contract, as embraced in the letter of September 18th, consigning the goods, it can be held that the complainant assumed such a risk in the present case. He assumed the expenses of transporting the goods to Mexico, the duty of selling them to the best advantage after they reached there, the obligation to account to the defendants for the price at which they might be sold, less one-half of the profits in excess of the invoice price; and, if not sold, he was to return the specific articles to the defendants free of expense. This agreement to return the goods in the event they should not be sold, it is urged, imposes upon him the risk of their destruction before he had an opportunity to sell or dispose of them under or in accordance with the terms of the consignment. We cannot accede to the correctness of this proposition. The destruction of the goods, without fault or negligence on his part, terminated his obligation to make either a return thereof, or pay for their loss. Such a liability could only be imposed upon him by a contract clearly expressing his assumption of the risk of destruction, or his liability for the loss.

In the case of *Hunt v. Wyman*, 100 Mass. 198, the bailee was to return the property (a horse) in as good condition as he received it, by a designated time. The property was so injured, without fault on his part, that it could not be returned within the time agreed upon, and no attempt was made to return it. Still, it was held that he was not responsible for the property. The court said: "A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy, but has no such legal effect as to convert the bailment into a sale. It might be an evidence of a determination by the defendant of his option to purchase, but it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence."

In *Walker v. Butterick*, 105 Mass. 237, the following contract was presented:

"Boston, November 25th, 1868.

"Alexander & Company, of the first part, are to take goods from Walker & Company,

of the second part, and to return to them, the said Walker & Company, every thirty days, the amount of sales, at the prices charged by the said Walker & Company, who will furnish Alexander & Company all goods in their line. Alexander & Company are worth, in real estate and money, \$5,000, of which they hereby certify.

[Signed]

"Alexander & Co.

"We agree to the conditions of the within instrument.

[Signed]

"Walker & Co."

It appears that, some months after the date of this contract, Alexander & Co. absconded, and one of their creditors levied upon goods which had been furnished by Walker & Co. The court held that the contract under which Walker & Co. claimed title to the goods levied upon imported a consignment of the goods for sale, and not a sale of them by Walker & Co. to Alexander & Co., so that the title remained in Walker & Co.

In *Middleton v. Stone*, 111 Pa. St. 589, 4 Atl. Rep. 523, A. delivered to B. two colts, under a contract that B. should safely keep and sell them, if possible, before a certain date, for A.,—he fixing a minimum price to be received by him, and in addition there-to one-half of all money obtained above that price, to the extent of \$25,—and, if not sold, to return the animals in good condition. Held, that this was not a sale, but a bailment, and it was error, therefore, to overrule the offer of B. to show that the colts were sick when they were delivered to him; that one of them died; and that he then offered to return the other to A., who refused to receive it. It was held that the horses were at the risk of A.

It is next urged, on behalf of the defendants, that the taking of the insurance in the name of complainant was a recognition of his responsibility for the loss of the goods, and that the policies of insurance were turned over to them to secure this liability of the complainant. This position cannot be sustained, for the reason that defendants, through their partner, Funke, directed that all the insurance should be taken out together in the name of Sturm, and also instructed the insurance broker to select for them the policies which they wished appropriated to secure their interest. The act of taking out the insurance, in the manner in which it was done, was their act, as much as it was the act of Sturm; and the insurance having been thus effected in no way tends to establish the contention that it was a recognition of Sturm's liability for the loss of the goods.

It is not material to determine whether the complainant ever indorsed and transferred these four policies to the defendants, or, if so, whether it was done at the time of their delivery, or subsequently, for no such assign-

ment or transfer thereof was necessary to have enabled the defendants to recover on the policies for the loss of cargo, to the extent of their interest in the same; it being well settled that under a policy running to Sturm, "for account of whom it might concern," the defendants could show and recover their interest, in the event of loss. It was so ruled by this court in *Hooper v. Robinson*, 98 U. S. 528, where it was said "that a policy upon a cargo in the name of A., 'on account of whom it may concern,' or with other equivalent terms, will inure to the interests of the party for whom it was intended by A., provided he, at the time of effecting the insurance, had the requisite authority from such party, or the latter subsequently adopted it."

In the present case, Sturm had the requisite authority of the defendants to make the insurance on the consigned goods, as was testified to by the insurance broker, and as shown in their letter of September 18, 1867, in which they say: "As you have insured these goods, as well as other merchandise, we should be pleased to have the amount of \$40,000 transferred to us." It is clear that the insurance, to the extent of \$40,000, was intended to cover the interests of the defendants in the consignment of September 18, 1867; and, in the absence of any delivery or transfer of policies representing that interest, this could have been shown by them, so as to entitle them to the benefits of such insurance.

It is next urged—and the court below seems to have taken the same view of the matter—that the complainant is estopped from denying his responsibility for the loss of the goods because of alleged statements made by him as a witness in the suits upon the insurance policies. It is claimed that in those suits he testified under oath that he was the owner of the goods, and thereby precluded himself from asserting anything to the contrary in this case, under the wise and salutary doctrine which binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made. We do not controvert the soundness of this general rule, as laid down in the cases cited by the defendants. *Dent v. Ferguson*, 132 U. S. 59, 10 Sup. Ct. Rep. 13; *Creath's Adm'r v. Sims*, 5 How. 192; *Wheeler v. Sage*, 1 Wall. 518; *Schiz v. Unna*, 6 Wall. 327; *Kitchen v. Rayburn*, 19 Wall. 254; *Bartle v. Coleman*, 4 Pet. 184; *Sample v. Barnes*, 14 How. 79; *Hannauer v. Woodruff*, 15 Wall. 439; *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. Rep. 557; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. Rep. 203; *Prince Manuff'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. Rep. 990; *Stiephens v. Robinson*, 2 Crompt. & J. 209; *Harmer v. Westmacott*, 6 Sim. 284; *De Metton v. De Mello*, 12 East, 234; *Post v. Marsh*, 16 Ch. Div. 335; *In re Great Berlin Steamboat Co.*, 26 Ch. Div. 616. But the question here

is whether the statements made by the complainant in the insurance suits bring him within the operation of this wholesome rule. We think not, for it would be pressing his language too far to hold that he made any positive statement to the effect that he was the absolute owner of the goods, or that he admitted as a matter of fact, rather than of opinion, that he was responsible for their loss. What he did state, when his testimony is read as a whole, was that he was the owner on consignment, for when the direct question was put to him, "What do you mean by being the owner for the time being?" his reply was: "That they were delivered to me by Hermann Boker & Co. under that agreement, and I was responsible for those goods until they were returned, or until I delivered the money to them. This is what I mean." And, in reply to another question, he stated that "the terms on which I was the owner were expressed in the papers I furnished," referring to the letters of September 18 and October 24, 1867. And to the further question whether he understood that those contracts made the goods his property, his answer was, "I understood so at the time, certainly, and I believe so yet."

This language did not mislead or induce either the defendants or the insurance companies to alter or change their position in any respect whatever, nor influence their conduct in any way. Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument.

In *Brant v. Iron Co.*, 93 U. S. 326, it was said: "Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no equitable estoppel."

So in *Brewster v. Striker*, 2 N. Y. 19, and *Norton v. Coons*, 6 N. Y. 33, and approved in *Chatfield v. Simonson*, 92 N. Y. 218, where it was ruled "that the assertion of a legal conclusion, where the facts were all stated, did not operate as an estoppel upon the party making such assertion."

In *Bigelow, Estop.* (5th Ed.) § 2, p. 573, it is properly said: "The rule we apprehend to be this: That where the statement or conduct is not resolvable into a statement of fact, as distinguished from a statement of

opinion or of law, and does not amount to a contract, the party making it is not bound, unless he was guilty of clear moral fraud, or unless he stood in a relation of confidence towards him to whom it was made. If the statement, not being contracted to be true, is understood to be opinion, or a conclusion of law, from a comparison of facts, propositions, or the like, and a fortiori if it is the declaration of a supposed rule of law, the parties may, with the qualification stated in the last sentence, allege its incorrectness." And again, (section 2, p. 571:) "A representation in pais, in writing, when not a part of a deed, or made the subject of a contract, though on oath, is no more efficacious, so far as the question of estoppel is concerned, than a verbal statement."

These authorities lay down the correct rule to be applied in the present case, and, tested by the principle they announce, the complainant is not estopped from claiming his rights under a proper construction of the contract, notwithstanding what he said in the insurance cases.

The grounds of estoppel against the complainant are not nearly so strong as they are against the defendants. It is clearly shown that Funke, a member of defendants' firm, in March, 1876, on the trial of the suit against the New York Mutual Insurance Company upon one of the policies in question, distinctly swore that the complainant was indebted to them only to the extent of \$32,000, and that they had no security whatever for the payment of that indebtedness. In his testimony in the present case, he fails to explain that sworn statement. That sworn statement is inconsistent with the claim now made,—that the complainant was at that time indebted to the defendants to the amount of over \$140,000,—and it is furthermore inconsistent with the position now taken,—that they held all the insurance policies, amounting to \$163,000, as collateral security for complainant's indebtedness. These sworn statements of Funke related to facts which were as well, if not better, known to the witness at that time than in 1882, and subsequently, when he testified in this case. Those statements are unexplained, and if they do not operate as an estoppel upon the defendants from now claiming a larger indebtedness than was then stated, and from claiming that all the policies were turned over to them as collateral security, they certainly cast suspicion and discredit upon their testimony in the present case. The question of estoppel need not be further discussed.

Upon the written contract, and all the relevant and competent evidence connected therewith, we are of opinion that the construction which the lower court placed upon the contract was incorrect; that the complainant was not an insurer of the goods; that he was not responsible for their loss; that the policy of \$15,000 on the cargo of the *Blonde*, turned over to the defendants, was

intended to cover their interest in that consignment, amounting to \$10,500, and that the four policies on the *Keese's* cargo, delivered to them, were to protect their interest in the consigned goods carried by that vessel, to the extent of \$29,327; that they held these policies to pay that amount in case of loss, and that the surplus, if any, was to be held in trust for the complainant. But if there were any doubt on this question Exhibits H and F, which were produced by the complainant during the progress of the suit, place the matter beyond all dispute. Said exhibits are as follows:

"Exhibit H.

"New York, October 11th, 1867.

"Memorandum.

"We have received from Johnson & Higgins \$163,000 policies on the schooner *Keese*, and \$30,000 on the brig *Blonde*, as per statement attached. We directed them to insure our goods for \$10,000, which covers our bill of September 18th, and premium, but no profit. To enable us to select our policies, General Sturm has indorsed in blank five policies, amounting to \$70,000, as follows:

[Seal.] On *Keese*, the Orient Mutual, \$15,000, and New York Mutual, \$12,500; Sun Mutual, \$12,500, and Mercantile Mutual, \$15,000.

On *Blonde*, the United States Lloyds policy for \$15,000, which we have taken as ours. Leaving a balance for us to select on *Keese* of \$25,000, of which we have so far selected only the Orient, and, as we cannot divide the policies to suit us, we hereby agree this day to keep all the four policies on the *Keese* for the joint account of ourselves and General H. Sturm, and, in case of any accident or loss, we will collect the amount of the policies from the companies, and pay over to General Sturm his share, viz. 30-55 of the whole amount collected; and we also agree to pay the premium notes for our share of the policies, and to stand all loss, if any should happen to our goods. General Sturm is to bear the shipping expenses, only, and in no event shall he be held responsible for any accident or damage, or any act of the Mexican government; but in case he cannot sell the arms at the price agreed upon, and has to return them, he shall insure them for our account.

"The foregoing is hereby fully approved and agreed to. Hermann Boker & Co."

"Exhibit F.

"Memorandum. We have insured our goods on the *Keese* and *Blonde* for a maximum of \$10,000, which includes the premium, which we have to pay. In case of accident, we select our policies, and we stand all loss, and Gl. Sturm pays shipping

expenses, only. We hold in trust for Genl. Sturm \$30,000 policies on the Keese, and also a package of Mexican bonds left over from the \$105,000 delivered to us Septbr. 20th. We also now direct Gl. Sturm to dispose of the batteries at any price.

"Steamer Wilmington, October 25, '67.

"Hermann Boker & Co."

These exhibits were vigorously attacked by the defendants, who at first claimed that both the body and signatures of the documents were forgeries. They afterwards admitted that the signatures were genuine, but insisted that the writing above them was forged. A great deal of proof was taken to establish this contention, but it fails, in our opinion, to show that these documents were forgeries. The signatures being genuine, the burden of proof was clearly upon the defendants to establish that the written part above the signatures was forged. The delay in the production of these documents is fairly accounted for by the complainant, and they are in harmony with what, we think, was the true nature and character of the contract and agreement of the parties.

Some reliance is placed upon what is called a statement of his account made to Sturm in Indianapolis in May, 1875, by Boker, one of defendants' firm. This account was clearly a partial one. It was made up by Rabing, the bookkeeper of defendants,—not from their books, but from memoranda furnished him by Boker,—but from what source he obtained it does not appear. The correctness of the account—shown by loose slips of paper and imperfect memoranda—was disputed by Sturm, and it is now conceded by defendants that it was not a full and accurate statement. Sturm claimed that they had not given him credit for money collected on his insurance policies, and that when they were all included the defendants would be indebted to him. The circumstances attending the presentation of this account, made at a time when Sturm was contemplating going into bankruptcy, tends strongly to show that the defendants were endeavoring to induce him to admit a much larger indebtedness to them than really existed, in order to give them an advantage in the event of bankruptcy. But, however that may be, there was no stated account accepted or acquiesced in by Sturm, such as would either conclude or require him to surcharge and falsify the same.

We have not deemed it necessary to determine whether the September invoice had on it the printed words "Payable in Gold"

when it was delivered. Those words form no part of the contract, as embodied in the letter of September 18, 1867, and complainant's acceptance thereof. They do not impose upon the complainant the liability to account for the value of the goods, in gold, in the event of loss by inevitable accident; and not being responsible for the goods, nor liable for the loss thereof, neither he, nor the proceeds of his insurance policies, can properly be subjected to the burden of making good either the defendants' loss, or paying such losses in gold. The insurance, as defendants admit, was not on a gold basis, but only for the invoice price of the goods in currency. The complainant was not an insurer, nor in any way liable for even the currency value of the consigned goods, and it would be a perversion of the contract, and inequitable, to require either him or his policies to compensate the defendants for their loss in gold.

We think the complainant has failed to make out a claim to compensation for his services in attending to the suits against the insurance companies.

In our opinion the complainant is entitled to the account he seeks by his bill, in which he should be credited with the amounts received by the defendants on the insurance policies in the proportion of \$152,266 to \$29,327, that being their relative interest in the cargo of the Keese; that the expenses of the litigation, including counsel fees, should be divided between the parties on the same basis; that the complainant is entitled to one-half of the sum of \$1,463.84, paid by way of general average on the goods shipped on the Blonde; to the further sum of \$672.68, for repairing the goods which reached Mexico in a damaged condition; and for whatever defendants realized on complainant's life insurance policies, and on the notes arising from the sale of the Indianapolis lots, if the amount so realized did not have to be repaid in taking up the notes; and with such other amounts as he may have placed in the hands of the defendants, either in the bank account or in the transaction connected with the insurance policies; and the defendants will be credited with all the amounts paid to and for the account of complainant not covered by the foregoing rulings. The account will be stated up to the filing of the bill, and any balance shown in favor of either side will bear interest from that date.

The decree is reversed, and the cause is remanded to the court below, to be proceeded with in conformity with this opinion.

So ordered.

CROSBY et al. v. DELAWARE & H. CANAL CO.

(23 N. E. 736, 119 N. Y. 334.)

Court of Appeals of New York. Feb. 25, 1890.

Appeal from supreme court, general term, third department.

Action by Abel A. Crosby and others against the president, manager, and company of the Delaware & Hudson Canal Company, for conversion of lumber. The lumber had been ordered from defendant by the firm of G. & E. Harnden, who had a contract to build boats for defendant, and this firm thereafter executed a bill of sale of the lumber to plaintiffs in consideration of an indebtedness to them. Defendant afterwards took the lumber. A judgment for plaintiffs was reversed by the general term, and a new trial ordered. (40 Hun, 637, *mem.*,) and on the new trial the complaint was dismissed. The judgment of dismissal was affirmed at general term, and plaintiffs appeal.

Lawton & Stebbins, (S. L. Stebbins, of counsel,) for appellants. *F. L. Westbrook*, for respondent.

ANDREWS, J. The transaction between the defendant and the Harndens was either a bailment of the lumber or a sale. Regarding it as a bailment, it was a bailment to be transmuted into a sale when the Harndens should use the lumber in building the boats, and thereby incorporate it with other lumber and materials required in their construction. It was not contemplated that the title to the boats should vest in the defendant until completion and acceptance. The consent of the defendant that the Harndens might use the lumber in the construction of the boats must be conceded. The bailment would necessarily terminate, and the title to the lumber would, by operation of law, vest in the Harndens, when it became by the consent of the defendant mingled with the lumber and materials of the Harndens in the process of constructing the boats. If, after the boats had been constructed, the Harndens had refused to perform their contract, or to deliver the boats to the defendant, the latter could not have asserted title to them on the ground that the lumber furnished by the company went into their construction. The Harndens would in the case supposed be liable for the value of the lumber as upon a purchase and sale, and possibly the defendant might enforce a lien on the boats to the extent of such value, in view of the circumstances. There was no objection in law to an arrangement between the defendant and the Harndens that, until the lumber was actually used for the purpose intended, the title should remain in the defendant. The point is whether the evidence conclusively establishes this to have been the arrangement, or could the jury have been permitted, if the case had been submitted to them, to find that the transaction at the outset was a sale to the Harndens. The contract for the boats was made November 8, 1882, by the acceptance by the Harndens of a written prop-

osition of the defendant that if they would build two boats during the following winter, for delivery in the spring, "the company will take them at twelve hundred dollars, (\$1,200,) subject to inspection and approval by the company inspector." The lumber in question was ordered by the Harndens of the defendant's agent, November 21, 1882, and was delivered on or about the 24th. The contract for building the boats did not require the defendant to furnish any of the lumber, nor did it require the Harndens to procure any from the defendant. The order for the lumber specified kinds and quantities, but no prices. The defendant's agent, on forwarding the lumber, sent a bill for the lumber, commencing, "Messrs. G. & E. Harnden, to the Delaware & Hudson Canal Co., Dr.," and this is followed by a specification of the quantity, kind, and price of each description of lumber sent, the prices aggregating \$412.77. The bill was partly written and partly printed, the ordinary bill-head of the company being used, and the words, "to the Delaware & Hudson Canal Co., Dr.," were printed. It does not appear that there were any negotiations between the parties prior to the delivery of the lumber, as to the terms and conditions on which it was to be furnished. The defendant, however, gave evidence showing that it kept on hand pine lumber for building boats, including pieces specially shaped, which it used in building boats at its own yards, and also furnished to boat-builders having contracts to build boats for the defendant, but it was furnished to third persons only for the purpose of having the same used in such boats, and that the value of the lumber furnished was deducted from the price of the boat, and that this custom was known to the Harndens. The bill of items is some evidence that the transaction was understood as a sale, although not conclusive. Whether a sale or a bailment, in either case the sum to be charged for the lumber was a matter in which both the Harndens and the company were interested. The custom of the defendant to supply lumber only for use in its boats, and to take the value out of the price of the boat, does not seem necessarily inconsistent with a sale. The Harndens testified that formerly they paid cash on delivery of lumber furnished by the defendant for boats which they built for the company, and that later the custom was to deduct the value of lumber so furnished from the price to be paid for the boat when completed, on delivery. It is insisted by the counsel for the plaintiffs that the jury might have found that the change was made from cash to credit sales, the credit extending to the time when by the contract the boat was to be completed. We think it would not be useful to go further into the details of the evidence. There seems to be but little equity in the claim of the plaintiffs to have the lumber applied on their debt. But we think the question whether there was a bailment or a sale was for the jury. The judgment should therefore be reversed, and a new trial ordered. All concur, except PECKHAM, J., not sitting.

JONES v. KEMP.

(12 N. W. 890, 49 Mich. 9.)

Supreme Court of Michigan. June 21, 1882.

Error to Kent.

Blair, Kingsley & Kleinhaus, for appellant.
Frank G. Holmes, for appellee.

CAMPBELL, J. This was an action on the case, for fraud in the purchase of wheat. The declaration contains three counts, all of which under various forms set out that defendant by false representations as to his credit procured plaintiff to sell and deliver certain wheat to him. The facts found by the amended finding are that in October, 1875, an arrangement was made whereby plaintiff was to deliver to defendant, who was a miller, 450 bushels of wheat, to be paid for on delivery or at any subsequent time when plaintiff demanded payment, at the Grand Rapids price current at the time of demand. It was understood that defendant might—as he did—use the wheat in his milling business to mix with other wheat of a different character for immediate grinding. In June, 1876, plaintiff demanded his pay at the current rates, and was induced to take a bank check at 10 days, by representations of solvency and prompt payment. In that interim defendant stopped business and made an

assignment, having been insolvent, for some period not named, but earlier than June 1st. The court on this held the deposit a bailment and the transaction of June 1st the only sale, and gave judgment for plaintiff.

We think this was erroneous. The plaintiff reserved no right to recall his wheat or any wheat or flour in its place. Defendant reserved no right to return it actually or in kind. He was bound at all events to keep it, and to pay for it on demand, while the money was payable without contingency. This was a sale and delivery at once, and without any credit on which defendant could rely. He was bound to have his money always ready, and to pay when called on. There was no fraud shown in the original dealings. If any fraud was committed at all it was in getting an extension of time on a matured debt. This is not the fraud charged. Had defendant refused on the first of June to make payment, plaintiff's only remedy would have been by action for the price. He could not have reclaimed the property.

The action therefore was misapprehended. Judgment must be reversed, and judgment entered for defendant on the finding, with costs of both courts.

GRAVES, C. J., and COOLEY, J., concurred.

MARSTON, J., did not sit in this case.

WELCH v. OLMSTEAD.

61 N. W. 541, 90 Mich. 492.

Supreme Court of Michigan. March 4, 1892.

Error to circuit court, Ionia county; Vernon H. Smith, Judge.

This was an action brought by Burt Welch, an infant, by Charles Burhans, his next friend, against Melvin Olmstead, to recover for work done. From a judgment for plaintiff, defendant appeals. Affirmed.

A. A. Ellis and F. C. Miller, for appellant, Davis & Nichols, for appellee.

MONTGOMERY, J. The plaintiff recovered below for work and labor performed for the defendant as a farm hand at the rate of \$12 per month. While it is suggested here that the court erred in instructing the jury that the rate was fixed at \$12 per month, and it is claimed that the bargain was conditional on the plaintiff's being able to earn that amount, yet, as the defendant in his plea set out the contract as a positive one to pay \$12 per month, and as he subsequently tendered the plaintiff payment at that rate, we think the instruction was correct. The real question involved is whether the defendant was entitled to set off against the claim of the infant plaintiff the purchase price of a watch and chain sold him while he was in his employ. The price of the watch and chain agreed on was \$20. There was evidence tending to show that it was not worth more than \$10 to \$12, while the testimony offered on behalf of the defendant showed that when new the watch would be worth \$14 to \$15, and the chain about \$4. There was also evidence that the defendant and his brother were constantly praising the watch to the plaintiff, and that it was as a result of this persuasion that he made the purchase. The plaintiff, after keeping the watch for some time, tendered it back to the defendant, and when he quit the defendant's service left the watch with him. The circuit judge also charged the jury as follows: "It has, we believe, always been held that the minor might bind himself by contract for necessities, and that such contract, when executed, when completed, if reasonable un-

der the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage, cannot be repudiated by him. Now, there is no presumption that any one acts fraudulently towards a minor. It cannot be said that Olmstead committed a fraud in selling a watch, without evidence; and whether everything was fair, or whether he committed any fraud or deception, is for the jury to say; it cannot be presumed without evidence. The party that comes into a case, and says that a fraud has been perpetrated, or undue advantage taken, or deception practiced, must produce evidence to sustain that point. There is no presumption of fraud; so that, gentlemen, if this watch was not a necessity, or clearly to the boy's prejudice, and not for his benefit, then he could avoid it, and he should not be charged with the watch; and the defendant should deal in good faith with the infant if it was not a necessity; and, if any unfair advantage was taken of the boy, then he might avoid the contract. —then this contract as to this watch, under the circumstances of this case, might be avoided and repudiated by the boy." We think this instruction sufficiently favorable to the defendant. There was evidence which, in view of the boy's age, tended to show that an unfair advantage was taken of him by the plaintiff. While, ordinarily, representations as to value are not evidence of fraud, yet in a case like this, where one is dealing with an infant, who is presumed by law to be unfamiliar with values of property of this character, we think it is proper to submit to the jury the question of whether good faith was observed. If the jury found, under the instructions, that the watch was not a necessity, the defendant was clearly not entitled to offset the claim for the watch against the demand of the plaintiff. The question of whether, if the consideration had been paid by the plaintiff, he could, before reaching his majority, repudiate the contract, is not involved. It is the defendant who here invokes the aid of the court to enforce the contract, and the case comes within *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557. Judgment will be affirmed, with costs. The other justices concurred.

JOHNSON v. NORTHWESTERN MUT.
LIFE INS. CO.¹

(59 N. W. 992, 56 Minn. 365.)

Supreme Court of Minnesota. July 10, 1894.

Appeal from district court, Hennepin county;
Seagrave Smith, Judge.

On rehearing. Affirmed.

For former report, see 57 N. W. 934.

Lusk, Bunn & Hadley, for appellant. F. P.
Lane and W. H. Briggs, for respondent.

MITCHELL, J. This case was argued and decided at the last term of this court. 57 N. W. 934. A reargument was granted for the reasons that although the amount was small the legal principles involved were very important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant. It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant. The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time

to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of \$5,000, should, from time to time, buy and pay for \$100,000 worth of goods, in the aggregate, which he had sold, and got his pay. According to this doctrine, he could recover back the \$100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting. But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessities. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessities, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities: First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield. Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor therefore having received no benefits from it, he may recover back what he has paid or parted with. Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received. Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in statu quo, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a

¹ Dissenting opinion of Gilfillan, C. J., omitted.

technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider. Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie. Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of *Holmes v. Blogg*, 8 Taunt. 508, approved as late as 1890 in *Valentini v. Canali*, 24 Q. B. Div. 166. Some obiter remarks of the chief justice in *Holmes v. Blogg*, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved,—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. *Corke v. Overton*, 19 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits. In *Chitty on Contracts* (volume 1, p. 222), the law is stated in accordance with the decision in *Holmes v. Blogg*. Leake,—a most accurate writer,—in his work on *Contracts* (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on *Domestic Relations* (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with what we may term the "English rule." Parsons, in his work on *Contracts* (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it." At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664; *Breed v. Judd*, 1 Gray, 455. But many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had

received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching. A similar principle applies to

all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no "fiduciary relation" between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction. If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering of the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill, 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one,

and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy. But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, nonparticipating policy for \$200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds. Order affirmed.

BUCK, J., absent, sick, took no part.

GILFILLAN, C. J., dissents.

* * * * *

BLOOMINGDALE v. CHITTENDEN.

(42 N. W. 166, 74 Mich. 698.)

Supreme Court of Michigan. April 24, 1889.

Case made from circuit court, Ionia county;
VERNON H. SMITH, Judge.

Replevin by George Bloomingdale by Alvira Bloomingdale, his next friend, against Leonard Chittenden, to recover possession of a colt. The court found the facts as follows: "(1) The property for which this action was brought, prior to January 30, 1886, belonged to and was the property of the plaintiff in this cause. (2) That about that date, January 30, 1886, it was included with other property in a bill of sale to defendant, which bill of sale was signed by plaintiff and his mother, and her husband, John Bloomingdale. (3) That plaintiff included this property in the bill of sale to defendant, intending to keep it from the hands of John Bloomingdale's creditors; that he never intended to transfer the title to defendant, and he, the defendant, did not understand that he was to become owner of same. (4) That it (the property) belonged to plaintiff before the bill of sale to defendant; that it was not intended to pass title to same to defendant, and the plaintiff was the owner of the same at the time of the commencement of this suit, and hence entitled to possession thereof. (5) That plaintiff was a minor under the age of twenty-one years at the date of bill of sale, January 30, 1886, and still under twenty-one years of age at time of trial of this cause, and no consideration was paid by defendant to the plaintiff for said property. I conclude, as a matter of law, that as John Bloomingdale's creditors would have no right to take this plaintiff's property to satisfy John Bloomingdale's debts, that this plaintiff is not estopped or prevented from asserting his right to its possession; and that judgment

should be for plaintiff for six cents damages, and costs to be taxed." Defendant contended that an infant's voidable contract cannot be disaffirmed during infancy, either by himself or any one for him. It can only be done by himself, and that after he becomes of age.

Frank A. Rodgers, for plaintiff. *Gleason & Bundy*, for defendant.

CAMPBELL, J. Replevin was brought against defendant for a colt belonging to the infant plaintiff. It appears by the special finding that the colt belonged to the boy, and was included in a bill of sale signed by him with his father and mother, made to defendant, without consideration, and with no intention of passing title. The purpose of the parties was to keep it from being seized by the father's creditors. There could be no fraud in preventing creditors from seizing what they had no right to seize. But this infant could not be bound by a transfer of his property which could not possibly be for his benefit, and still less by a formality which no one supposed was meant to divest his title. Such a transfer is not presumed to be binding for any purpose, and an action lies at once to resume the property from the unauthorized holder, and it is properly brought in the infant's name by his next friend. There is nothing in the finding to invalidate the proceeding as brought, and the objections urged on the argument are of no account. It may be remarked that the printed record shows neither exceptions nor assignments of error. If none were filed, there is nothing to review. But we see no error which could have been relied on. The judgment must be affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN, MORSE, and LONG, J.J., concurred.

PEMBERTON BUILDING & LOAN ASS'N
v. ADAMS.

(31 Atl. 280, 53 N. J. Eq. 258.)

Court of Chancery of New Jersey. March 6,
1895.

Bill by the Pemberton Building & Loan Association against George L. Adams. Decree for complainant.

Joseph H. Gaskill, for complainant. John W. Wharton, for defendant.

BIRD, V. C. The principal question in this case is whether the defendant, George L. Adams, represented himself to be of age, and on such representations secured the loan of the moneys named in the mortgage. The evidence shows that when the parties were negotiating the person making the loan asked Adams if he was of age, to which Adams replied that he was. That such inquiry was made is not only established by the testimony of the person who made it, but by a bystander, who distinctly heard the inquiry, but did not hear the answer thereto, although he swears that something was said by way

of reply. Adams says he made no representations concerning his age. I have no doubt but the inquiry was made, and that the answer was purposely false. It is equally clear that the statement that he was of age was relied upon; and that the loan would not have been made if the answer had been according to the fact. The law will not, under such circumstances, allow a frauddoer to protect himself under the plea of infancy. *Jones, Mortg.* § 631; *Herm. Estop.* p. 1232, §§ 1100, 1118; *Id.* p. 1253, § 119; *Parker v. Hayes*, 39 N. J. Eq. 478, 479; *Id.*, 41 N. J. Eq. 631, 633, 7 Atl. 511; 2 Pom. Eq. Jur. §§ 789, 945. In the next place, Adams, after coming of age, retained the possession of this property, and claimed and enjoyed all the benefits of a conveyance thereof, and now raises this defense of infancy without offering to return the consideration money. Under these circumstances, his liability continues, even though there had been no fraud. *Jones, Mortg.* §§ 104, 105; *Herm. Estop.* p. 1257, § 1121; 3 Wait, Act. & Def. 443, and many cases there cited; 1 Story, Eq. Jur. § 385. The complainant is entitled to a decree, with costs. I will so advise.

STACK v. CAVANAUGH et al.

(30 Atl. 350.)

Supreme Court of New Hampshire. Hillsborough. March 11, 1892.

Assumpsit by Timothy Stack against Cavanaugh Bros. to recover money paid in the purchase of a horse. Judgment for plaintiff.

At an auction sale of horses by the defendants October 12, 1886, the plaintiff bid off a horse at the price of \$112.50, which was delivered to him on payment of \$25, and upon the understanding that the balance of the price was to be secured by note and a mortgage upon the horse. The plaintiff took the horse away, and, upon harnessing him to a wagon, found that he was unable to drive him. The plaintiff took the horse back to the defendants' stable that night, told them the horse would not go, and asked them to refund the \$25. The defendants declined to pay back the money, but offered to exchange horses with the plaintiff; and another horse, which they bought in the west, had had but a few days, and had driven two or three times, was harnessed, and the plaintiff rode after him, but concluded not to take him. The plaintiff left the horse at the defendants' stable, and requested them to do the best they could with him. Upon harnessing the horse the next morning, he was found to be contrary and unmanageable, and some time afterwards he was sent to Boston and sold, and the defendants received \$70 for him, after deducting expenses. The horse was six years old, and had been broken to travel with another horse, but had been driven to a single carriage only once or twice before the day of the sale. A person accustomed to handle horses could drive him. The plaintiff had no experience in driving or handling horses, and was unable to drive or manage him. The horse was fretted and worried, and made balky and unmanageable by the plaintiff's unskillful management in attempting to drive him, and was depreciated in value thereby to an amount exceeding the sum paid by the plaintiff to the defendants. The plaintiff had the horse in his possession four or five hours. The plaintiff was a minor when he bought the horse and when this suit was commenced. He never told the defendants that he was an infant, and they did not know, and had no reason to suppose, that such was the fact until the plaintiff's mother informed them, and requested them to pay back the \$25, six or eight months after the transaction. The contract for the purchase of the horse was not a contract for necessities, nor did the plaintiff derive any benefit from it.

Burnham, Brown & Warren, for plaintiff.
O. E. Branch & J. F. Briggs, for defendants.

ALLEN, J. It is the settled law of this state that an infant may avoid his contract of sale by rescinding the contract and restoring the property to the vendor. If he

does so, he may recover the price paid by him for the property. *Heath v. Stevens*, 48 N. H. 251. If he does not restore the goods, and has not paid for them, he is liable in a suit by the vendor for so much of the price as is equal to the benefit derived from the purchase. *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, *Id.* 408. In this case the plaintiff returned the horse to the defendants, reduced in value by the plaintiff's inexperience and want of skill in driving. Though returned on the same day, and within a few hours, of the purchase, it was not the same horse in character and value. But the acts of the plaintiff in dealing with the horse were the result of ignorance and want of skill in the management of horses, rather than of willful abuse. Being an infant under full age, the same conduct towards a horse bailed to him for hire would have given the owner no ground for recovery. *Eaton v. Hill*, 50 N. H. 235. It is only for positively tortious acts willfully committed that an infant is liable in an action of trespass or case. If the management and driving of the horse by the plaintiff in this case were not of such a character as to give the defendants a right of action had the plaintiff hired the horse, they cannot make the fact of injury from the same treatment by him as owner of the horse a ground for recompement of damages. To give them this right the claim must rest upon a basis which would enable them to recover for an injury to their own property, and this they cannot do in a case of this kind against an infant. The plaintiff's incapacity of infancy was known to the defendants before the suit was brought, and his treatment of the horse was not malicious nor willful abuse. Upon the facts stated the defendants have no defense. Judgment for the plaintiff.

CLARK, J., did not sit. The others concurred.

On Rehearing.

SMITH, J. The former decision in this case, it is claimed, was based upon the erroneous assumption of fact that the plaintiff had rescinded the contract, when in fact he only proposed to rescind, and, instead of rescinding, ratified the contract by leaving the horse with the defendants to be sold. It is further claimed that when repayment of the purchase money was requested, rescission had become impossible, because, the horse having been sold on the plaintiff's account, the property could not be returned in specie. Whether what took place when the plaintiff returned the horse was a rescission, a proposition for a rescission, or a ratification of the contract of purchase, it is not necessary to consider. The plaintiff's right of rescission remained during his minority, and was not defeated by the defendants' refusal to refund the purchase money, nor by his request to them to do the best they could with the property. The contract and subsequent alleged

ratification were voidable at his election, and were repudiated when he brought this suit. The bringing of the suit was an election to rescind. *Eaton v. Hill*, 50 N. H. 235, 241. The fact that the horse had been injured by the plaintiff's unskillful driving did not, as shown in the former opinion, deprive the plaintiff of his right to return it. He derived no benefit from the contract. It was not necessary to renew his offer to return the property. It went into the defendants' possession when the plaintiff first attempted to rescind, and was sold by them. The money received by them from the sale stood in place of the horse. The presumption is that they acted in good faith in the sale, and got the most they could for the property. If they did not, they are in no

position to complain. If the plaintiff's mother was acting in his behalf when she requested the return of the purchase money, what was then done was equivalent to a rescission, and the result is the same. The defendants are not, as contended, entitled to judgment upon the ground that they had no reason to suppose the plaintiff was an infant. He did not affirm himself to be of full age, and there is nothing in the case that shows that at the time he made the purchase he intended to elude the contract. The case in this respect differs from *Fitts v. Hall*, 9 N. H. 441 (see page 449). Judgment for the plaintiff.

CLARK, J., did not sit. The others concurred.

GREGORY v. LEE.

(30 Atl. 53, 64 Conn. 407.)

Supreme Court of Errors of Connecticut. June 29, 1894.

Appeal from court of common pleas, New Haven county; Studley, Judge.

Action by Mary E. Gregory against Frank Lee for rent of a leased room. Judgment for defendant, and plaintiff appeals. Affirmed.

Talcott H. Russell, for appellant. Edward G. Buckland and Harry G. Day, for appellee.

TORRANCE, J. The complaint in this case alleges that on the 1st of June, 1892, the defendant, being a student in Yale College, entered into a contract with the plaintiff, by which he leased a room for the ensuing college year of 40 weeks, at an agreed rate of \$10 per week, payable weekly, and immediately entered into possession of said room, and has neglected and refused to pay the rent of said room for the 10 weeks ending February 7, 1893. The answer, in substance, is as follows: On or about September 15, 1892, the defendant agreed to lease a room in the house of the plaintiff for the ensuing college year of 40 weeks, at the agreed rate of \$10 per week, payable weekly; that he then entered into possession of said room, and occupied it till December 20, 1892; that on said day he gave up possession of said room, and ceased to occupy the same, and then paid to the plaintiff all he owed her for such occupation and possession up to that time; that immediately thereafter he engaged at a reasonable price another suitable room elsewhere, and continued to possess and occupy the same till the end of said college year; that during all of said period he was a minor, and a student in said college; and that on December 20, 1892, he refused to fulfill said agreement with the plaintiff to occupy or pay for said room for the remainder of said 40 weeks, and has always refused to pay for the time during which he did not possess or occupy said room. The reply to the answer was as follows: "Paragraph 1. Plaintiff admits all the allegations of said defense. Par. 2. Defendant, at the time of making said contract, was between nineteen and twenty years of age. Par. 3. Defendant and his parents are residents of the island of Trinidad. His father makes him an annual allowance, out of which he is expected to defray all his college expenses, including room and board, transacting the business incidental thereto in his own name, and not on account of his father. Par. 4. It is the general custom among students and lodging-house keepers to rent rooms for the college year of forty weeks, and students also usually contract for and pay tuition by the year. Defendant, at the time of renting said rooms, had contracted for his tuition during the college year. Par. 5. The rent charged for the room was fair and reasonable, and was suitable to his necessities as a student and to

his condition in life. It was also necessary for him to have a room as a place of lodging and study during his college year. Par. 6. Defendant could not have obtained a room equally suitable for his purpose, nor on such advantageous terms, if he had not contracted for the year, except by going to a hotel, and paying the usual charges made by hotels for such period as he wished to stay. The cost of this would have been considerably greater. Par. 7. Owing to the custom above noted, plaintiff cannot rent her room for the balance of the year, and will be subjected to great loss, unless defendant is compelled to pay rent for the balance of said period." There was also filed in the case a second defense and a reply to the same, which, in view of the conclusion reached upon the first defense and the reply thereto, need not be considered. To the reply above set out the defendant demurred specially, the court below sustained the demurrer, and judgment was rendered for the defendant. The sole reason of appeal is the claimed error of the court in sustaining the demurrer.

Upon this appeal the facts stated in the answer, and also in the reply so far as the same are well pleaded, must be taken to be true. It thus appears that the defendant, a minor, agreed to hire the plaintiff's room for 40 weeks at \$10 per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room, and refused to fulfill said agreement, on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere. Under the facts stated, it must be conceded that this room, at the time the defendant hired it, and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessity, for lodging comes clearly within the class of necessities; and the room in question was a suitable and proper one, and during the period he occupied it was his only lodging room. "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt." *Chapple v. Cooper*, 13 Mees. & W. 252; 1 Swift, Dig. 52. So long, then, as the defendant actually occupied the room as his sole lodging room it was clearly a necessity to him, for the use of which the law would compel him to pay; but, as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties. The question now is whether he is bound to pay for the room after December 20, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi contractual nature; for it may be imposed on an in-

fant too young to understand the nature of a contract at all. *Hyman v. Cain*, 3 Jones (N. C.) 111. And where an infant agrees to pay a stipulated price for such necessaries, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessaries. *Earle v. Reed*, 10 Mete. (Mass.) 387; *Barnes v. Barnes*, 50 Conn. 572; *Trainer v. Trumbull*, 141 Mass. 527, 6 N. E. 761; *Keen*, *Quasi-Cont.* p. 20. This being so, no binding obligation to pay for necessaries can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessaries. For the purposes of this case, perhaps, we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it as what, on the whole, it appears the parties intended it to be, a parol lease, under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defense of infancy is a good defense; for in that case the suit is upon an executory contract to pay for necessaries which the defendant refused to take, and never has had, and which, therefore, he may avoid. If we regard the transaction as a lease under which possession was taken,

executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defense. As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. *Riley v. Mallory*, 33 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. * * * As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." *Tayl. Landl. & Ten.* § 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner. The plea of infancy, then, under the circumstances, must prevail, unless the matters set up in the reply make the facts set up in the answer unavailable in this case. Upon this point, without dwelling in detail upon the matters set up in the different paragraphs of the reply, we deem it sufficient to say that neither singly nor combined do the matters so set up constitute a sufficient reply to the answer. There is no error. The other judges concurred.

LANGDON v. CLAYSON et al.

(42 N. W. 805, 75 Mich. 204.)

Supreme Court of Michigan. June 14, 1889.

Appeal from circuit court, Montcalm county; SMITH, Judge.

Lemuel Clute, for complainant. *W. C. Beckwith* and *Davis & Nichols*, for defendant Palmer.

CHAMPLIN, J. Complainant filed his bill January 4, 1887, to foreclose a mortgage. As originally filed it contained only the usual statements of bills of that kind. It alleged that May Clayson and Charles D. Clayson made their two promissory notes payable to complainant, dated March 28, 1882,—one for \$400 due three years from date, and the other for \$500 due six years from date, with interest payable annually at 7 per cent. The mortgage was of even date, and was executed by May Clayson, and covered 40 acres of land in Montcalm county. Luce and Palmer were made parties as subsequent purchasers or encumbrancers. Palmer was the only defendant who answered. He set up that May Clayson was an infant under 21 years of age at the time she executed the mortgage, and that it was given to secure the debt of her husband, Charles D. Clayson. He alleged that he purchased the premises on or about August 30, 1884, from May Clayson, paying therefor a valuable consideration, and obtaining a quitclaim deed, and afterwards, about the 22d day of October, 1884, after said May Clayson became of age, and for a valuable consideration to the said May Clayson in hand paid, she made, executed, and delivered to him a warranty deed, and also revoked all former deeds and mortgages by her made before she became 21 years of age by inserting therein the following: "It being the intention of the first party to convey to the second party all the title I had to the premises at the time I became twenty-one years of age, and to expressly revoke all former deeds and mortgages by me made before I became twenty-one years of age." That the mortgage to complainant is void, and constitutes a cloud upon his title, which he asks to have removed, and he prays for relief and the benefit of a cross-bill. The complainant then amended his bill of complaint, stating therein that May Clayson purchased the land from John Q. Wakely February 11, 1881, and took from him a warranty deed in which the conveyance to her was made subject to two mortgages,—one for \$300, given by James Rich and wife to Thomas Fuller, guardian of May Fuller, and the other for \$500, given by John Q. Wakely and wife to James Rich,—which mortgages were to be paid by May Clayson as part of the consideration for the land on her purchase from Wakely, and that she obtained the loan of the money from complainant for which said notes and mortgage were given to pay the above-mentioned mortga-

ges, that she stated when she purchased of Wakely, that such indebtedness was her own, and that Charles D. Clayson merely signed the notes as surety; that she represented herself to be 21 years old, and that complainant would not have loaned the money to her had he supposed that she was an infant. He further stated that afterwards, and on the 24th of February, 1883, May Clayson sold and conveyed said land to John Q. Wakely by warranty deed, which contained this clause: "The above is subject to a certain mortgage given to Langdon March 28, 1882, for \$400;" and on September 2, 1884, said John Q. Wakely executed a deed of the land to V. B. Luce, and afterwards, on July 22 and October 22, 1884, said May Clayson executed the deeds above referred to. The bill charges Luce and Palmer with confiding and confederating with May Clayson to cheat complainant; charges on belief that she was of full age when she executed the deed to Wakely, and therein ratified the mortgage; states that May Clayson and Charles D. Clayson have removed to and are residents of Dakota, and are peculiarly irresponsible; that the facts and circumstances of the transaction entitle him, if she was a minor, to be subrogated to the rights of the mortgages named in the deed to her from Wakely, and which she procured to be discharged with the money obtained from him.

The bill of complaint was taken as confessed against all of the defendants except Palmer, who answered the amended bill, in which he sets up substantially the same defense as in the answer to the original bill, and denies all confederacy and connivance to cheat and defraud complainant; claims that he is the owner in fee; and claims, further, the benefit of a cross-bill, and that his title may be quieted. Proofs have been taken from which it appears that May Clayson, whose maiden name was May Fuller, was born May 15, 1862. That she was married to Charles D. Clayson prior to February 11, 1881. On February 11, 1881, John Q. Wakely conveyed to May Clayson by warranty deed the land in question, in which deed is contained the following: "Said second party taking said premises subject to two certain mortgages,—one of \$300, given by James Rich and wife to Thomas F. Fuller, guardian of May Fuller, minor, etc., the other, \$500, given by John Q. Wakely and wife to James Rich, together with accrued interest on the same; the amount of said mortgages being deducted from the purchase price of said premises on this purchase." The mortgage to Fuller, guardian, bears date June 30, 1879, and is given to secure the payment of \$300 on the 3d day of April, 1883, with interest at 7 per cent., payable annually. The mortgage to James M. Rich, given by Wakely, bears date the 1st day of October, 1880, and is given to secure the payment of \$500 on the 1st day of April, 1884, with interest at the rate of 10 per cent., payable semi-annually on the 1st days of October and April. No question is

made as to the validity of these mortgages. The next conveyance in the order of time is the mortgage to complainant dated March 28, 1882, executed by May Clayson to secure the payment of the notes set forth in the bill of complaint. On the same day, *i. e.*, March 28, 1882, Ruth Ropp, the assignee of the mortgage executed by James M. Rich to Thomas F. Fuller, guardian, dated June 13, 1879, executed a full satisfaction and discharge thereof, and also, on the same day, James M. Rich executed a full satisfaction and discharge of the mortgage given by Wakely to him on October 1, 1880. The mortgage to complainant and the two discharges above mentioned were each recorded in the register's office on the 29th of March, 1882, at 6 o'clock p. m. On the 28th day of February, 1883, May Clayson executed a statutory warranty deed of the land to John Q. Wakely, which contains this sentence: "The above is subject to a certain mortgage given to Langdon March 28, 1882, for nine hundred dollars." This deed was placed on record February 12, 1884. On the 22d day of July, 1884, May Clayson executed a quitclaim deed of the premises to Don E. Palmer. This was acknowledged before a notary public in Montcalm county, and was placed on record the 30th day of August, 1884. On the 2d day of September, 1884, John Q. Wakely and his wife executed a quitclaim deed to V. B. Luce, which was placed on record September 3, 1884. The next deed is dated October 22, 1884. It is a warranty deed from May Clayson to Don E. Palmer, and contains the clause following: "This deed is executed and delivered by first party for the purpose of supplementing and adding to a quitclaim deed, previously given by first party to second party herein, and conveying the above premises, and adding thereto covenants of title; it being the intention of the first party to convey to second party all the title I had to the premises at the time I became twenty-one years of age, and to expressly revoke all former deeds and mortgages made by me before I became twenty-one years of age." This deed was not acknowledged until the 4th day of November, 1884, before a notary public of Brown county, territory of Dakota, and was placed of record on the 14th of November, 1884. The only proof introduced on the part of the defendant was his title deeds from May Clayson, and testimony tending to prove her age, and that about \$30 of the \$900 loaned was used in paying either a store account or note of Charles D. Clayson. The second deed executed by May Clayson to defendant Palmer conveyed no title or interest in the land whatever, and there was nothing to which the covenants of warranty could attach. As independent covenants for title they were worthless, for the reason that the defendant was a married woman, and the covenants had no connection with any separate property owned by her. The complainant showed that the loan was obtained by May Clayson to take up and discharge the

two mortgages that were valid liens upon her property, and that it was used for that purpose, with the exception of a few dollars. The arrangement made was beneficial to May Clayson. The time for payment was extended, and the interest on \$500 reduced from 10 to 7 per cent. The money was loaned by the complainant in good faith, and upon the supposition that May Clayson was of full age. Mr. Rogers, the agent of complainant, who made the loan, testifies that to appearance May Clayson was at that time 25 years old, and he got the impression from what was said and done that she was then of full age.

When the defendant obtained his quitclaim deed from May Clayson he had record notice of complainant's mortgage, and that it appeared to be the first lien upon the land. He had record notice that the legal title had been conveyed from May Clayson to Wakely by warranty deed expressly made subject to complainant's mortgage. More than a year had elapsed since May Clayson had attained her majority, and by no word or act had she repudiated or revoked the mortgage to complainant, or her deed to Wakely. Defendant Palmer is not sworn as a witness, and there is nothing in this record which shows that he ever paid a dollar consideration for the land in question. He places himself upon a purely legal defense, and shows himself entitled to no equities whatever. The claim set up in the defense that this \$900 was obtained, and the security given, to pay the debts of the husband of May Clayson, has failed substantially, and I think entirely. It is true that May Clayson in her deposition taken in Dakota says: "The mortgage was given to secure my husband's indebtedness. Part of the money obtained on that mortgage went to pay off a first mortgage, and the balance went to pay other indebtedness of my husband." But the proof is satisfactory that she is mistaken. The money was not obtained to pay her husband's indebtedness, but to pay off incumbrances on her property. That she represented that to be the purpose when she obtained the loan, and that all but a very small fraction was then and there applied to that purpose. More unsatisfactory is the testimony of E. Barrett and Mr. Rockafellow. Barrett is asked if he knows anything about what was done with the money that was borrowed of Mr. Rogers, the witness spoken of, and he replies: "Well, I think it went to Mr. Rockafellow,—what she owed him. I suppose it was a family debt. I don't know whether her contracts or his contracts,—store bills. He kept a store there at that time." Mr. Rockafellow is asked if he recollected the transaction of the giving the mortgage to Langdon, and if he knows anything about what was done with the balance of this money spoken of. He testified that part of it was paid to him,—that he did not remember the amount,—for a note he held against Charles Clayson. He could not say positively. He had quite a good deal to do with Clayson, and he thought the note was for a

horse, and thought it was somewhere in the neighborhood of \$25 to \$30. That he knows where he got the money because he (Rockafellow) tried to make a loan for them to another party before that one. They wanted to get the money partly to pay off the mortgages and partly to pay him. They owed him a store account besides the note. Rogers testified that they computed the amount due upon the mortgage indebtedness, and it came to nearly \$900, and they said they would take \$900. There was a small balance over, probably one or two dollars. Whatever it was, was paid to May Clayson, and he does not know what was done with it. I do not think that this small balance, whether \$1 or \$30, that was paid to Mrs. Clayson after paying the mortgages, has anything to do with the validity of the mortgage in question.

It is evident that the object and purpose of making the loan of Mr. Langdon was to pay off and discharge the existing incumbrances upon May Clayson's land, and to substitute the lien of the Langdon mortgage for those, and obtain a longer time for payment at a lower rate of interest. Upon what principle of equity or justice can the validity of this mortgage be attacked and set aside as invalid? The infant was by her own oath then nearly 20 years of age. More than a year previously she had purchased this land, and taken the title in her own name, subject to the incumbrances which she assumed and agreed to pay as part of the purchase price. She has never repudiated this transaction, but has ratified and affirmed it after her majority by dealing with the title she thus acquired as owner. She could not ratify the purchase without ratifying the agreement to pay the existing liens as part of the purchase money, nor without ratifying the manner in which she dealt with those liens. She voluntarily sought complainant, and borrowed the money from him to pay off these incumbrances by placing another upon the premises. By this she only shifted her obligation

to pay Ropp and Rich to pay the same purchase price to complainant. She is not harmed by this transaction, but is benefited.

While there is no absolute time in which an infant must act after he has arrived at the age of 21 to prevent the presumption of ratification arising from lapse of time, and while courts will not be curious to inquire whether the act was beneficial or not, or otherwise, or stringent in applying the rule that he must act in a reasonable time when it is proper to protect his rights, yet when he has a right to repudiate a transaction in which he has not been defrauded or overreached, and where he has received and retained the benefit of the transaction, he must act with reasonable promptness, or he will be deemed to have ratified the act by acquiescence.

Under the facts of this case, independently of other considerations under which this mortgage must be treated and held as a valid security, a right-minded person never would have attempted to repudiate the mortgage executed for the purpose and under the circumstances of this case, and, after the lapse of more than one year after she reached majority, she will, in aid of justice and equity, and to prevent fraud, be deemed to have intended to ratify the transaction by her silence and acquiescence. It would be a reproach upon the administration of justice if a scheme so inequitable and unconscionable as this appears to be from the record should succeed. Courts of equity will always view with special favor, and guard with jealous care, the rights of infants, but they will not lend their aid to infants, or those who entrench themselves behind them, to perpetrate wrong upon innocent parties, or aid in depriving such parties of their just rights. The decree of the circuit court is honest, and should be affirmed.

SHERWOOD, C. J., CAMPBELL and MORSE, J.J., concurred. LONG, J., did not sit.

TYLER v. GALLOP'S ESTATE.

(35 N. W. 902, 68 Mich. 185.)

Supreme Court of Michigan. Jan. 12, 1888.

Error to circuit court, Clare county; Henry Hart, Judge.

Action by R. Smith Tyler against John Fleming, administrator of the estate of Franklin Gallop, upon a note executed by the deceased during his lifetime. There was a verdict and judgment for plaintiff, and defendant brings error. Reversed.

C. W. Perry, for appellant. Browne & Cummins, for appellee.

MORSE, J. The plaintiff presented a claim against the estate of Franklin Gallop, deceased, based upon a promissory note for \$110, dated August 22, 1882, payable in one year from date, with interest at 10 per cent. The note was signed by William Gallop and Frank Gallop, (the deceased,) as makers. The claim was disallowed by the commissioners. Plaintiff appealed to the circuit court for the county of Clare. Upon the trial in that court, testimony was given on behalf of the defendant tending to show that the note in question was given in place of another note made by Daniel Gallop, and also signed by William Gallop, to plaintiff; and that said Daniel Gallop had offered to pay the first or original note given by him to plaintiff, and had always been ready and willing to pay the same at any time, but said plaintiff had never offered to deliver said original note up to Daniel; and that said note was past due when the note in suit was executed. And further evidence was given on the part of defendant tending to show that at the time this note was made, Franklin Gallop was a minor, and had never been emancipated by his father, the said Daniel Gallop, and that the contract contained in said note had never been ratified by Frank after attaining his majority; that Daniel had no knowledge of the note in suit being given to take up the original note. In rebuttal, the plaintiff introduced testimony tending to show that, when the note made by Frank and William was received by him, the original note was delivered over to them, and that it was not in his possession at the time of the trial, and never had been since the note in suit was executed and delivered to him. Also evidence tending to prove that, at the time the note in question here was given, the deceased, Franklin Gallop, had been emancipated, and was doing business in his own name for his own benefit, with the consent and approval of his father, and that Daniel authorized Frank to take up the original note, and, at the time, Frank and William were in partnership, and the said note was given in the course of their partnership transaction. The circuit judge instructed the jury, in substance and effect, that the deceased failing to

give notice to the plaintiff during his lifetime, after he became of age, (he having lived some two years after he became twenty-one years of age,) that he could not and would not be bound by his signature to said note, his legal representatives after his death could not take advantage of his silence without offering some proof, at least, that the deceased did not intend to be bound by his contract; and directed a verdict for the plaintiff for the face of the note and interest.

The judgment entry in the circuit court is not correct, or applicable to proceedings of this kind. No error is assigned upon it, but a common-law judgment cannot run against the administrator, or against the property in his hands as such, as it does in this case. The entry should be an allowance or disallowance of the claim, which allowance or disallowance is to be certified to the probate court. See *La Roe v. Freeland*, 8 Mich. 531-534.

The only errors assigned in the record are to the charge of the court. We think the case should have been submitted to the jury. If the deceased was a minor at the time of the execution of this note, the burden of proof was upon the plaintiff to show that he had ratified it after he attained his majority. It seems from the record that there was evidence tending to prove that deceased had not ratified the contract. The circuit judge was not authorized in law to presume a ratification because of the mere silence of the deceased for two years. There must have been an express promise after he became of age, or such acts as would have been equivalent to a new contract. *Goodsell v. Myers*, 3 Wend. 479; *Wilcox v. Roath*, 12 Conn. 559; *Tucker v. Moreland*, 10 Pet. 58; *Ford v. Phillips*, 1 Pick. 202; *Fetrow v. Wiseman*, 40 Ind. 148; *Tyler, Inf.* (2d Ed.) 84-92; *Mimock v. Shertridge*, 21 Mich. 304; *Prout v. Wiley*, 28 Mich. 164.

The record in this case is blind and uncertain. It appears that there was evidence tending to show that the original note was delivered over to William Gallop and the deceased, but which one of them took and kept possession of it we are not informed; nor does it appear whether the relation of the deceased to the note sued upon was that of maker or surety for William. We do not propose, therefore, to discuss what might be the law applicable to facts which may not be facts in the case.

The question whether or not the deceased was emancipated by his father at the time he signed this note had no relevancy to the issue. It could not affect his liability upon this note.

The judgment of the court below is reversed, and a new trial granted, with costs of this court to defendant.

CHAMPLIN and SHERWOOD, JJ., concurred. CAMPBELL, C. J., did not sit.

DURFEE v. ABBOTT et al.

(28 N. W. 521, 61 Mich. 471.)

Supreme Court of Michigan. June 10, 1886.

Error to circuit court, Wayne county.

Alex. D. Fowler, for appellants. Fraser & Gates, for appellee.

CHAMPLIN, J. This suit is brought upon a residuary legatee's bond to recover a legacy given by the last will and testament of John T. McKeown, deceased, to Kate Lantz. The case was before this court at the April term, 1883, and is reported in 50 Mich. 479, 15 N. W. 559. Sophia Lantz, who was one of the legatees for whose use the suit was then prosecuted, has since dropped out of the case as a party interested. Under the facts as they appeared in the record before the court, she had no right to recover.

It appeared, as it now appears, that on October 20, 1877, the executor gave to these legatees his individual notes for the legacies, payable to them two years from that date, with interest. The legacies were payable when the notes were given, and they signed and gave to the executor receipts, stating that they had received from the executor of the estate of John T. McKeown, deceased, \$250, being the legacy bequeathed to them, respectively. It was held that, by this extension of the time of payment without the sureties' assent, they were discharged from liability. But it also appeared that Kate Lantz was not 21 years of age at the time the note to her was given, and therefore she stood in a different position; that she had no power to extend the time for payment, and she did not become of age until after the note given her became due, and unless she did some act, after she came of age, extending the time, or in some other way changing McKeown's liability, she is not barred of her action; and, inasmuch as the note in her hands was past due when she came of age, the time was not extended by her retaining the note, and that it should not be held as payment until so treated in fact.

It will readily be seen that the contest upon the retrial centered upon the question of the age of Kate Lantz. On the part of the plaintiff, Kate Lantz testified that she was born November 5, 1858, and that her full name is Catherine Sophia Barbara Lantz; that her father's name is Jacob Lantz, and her mother's Barbara Lantz; and that her parents lived on Clinton street, in Detroit, when she was born. Sophia Smith, a sister, testified that Kate was born in 1858. Caroline M. Lantz, another sister, testified that Kate was born in 1858, and that her birthday was November 5th. She stated, that she had seen the entry in the family record made in the family Bible, and had last seen it seven or eight years ago; that the entry read, "Sophia Catherine Barbara Lantz, born 1858;" that the record of her own birth was entered there, and read, "Caroline Matilda Lantz, born in 1856;" and that the entry of the birth of Sophia read, "Sophia

Catherine Lantz, 1849." Mrs. Barbara Lantz, the mother, was sworn for plaintiff, and testified that her age was 65, and was not able to remember the age of her daughters except the eldest; that they had a family record in the Bible, but her husband took it away with him, and she had not seen it since. She states that she was married in 1849, and four of her children were baptised on Clinton street, by the pastor of the German Lutheran Church on Monroe avenue; that Kate was baptised by the name of Catherine Sophia Barbara Lantz. She first stated that the minister's name was Herman who baptised all four of the children, but afterwards recalled the fact that one was baptised by a minister by the name of Miller, of the Monroe Avenue Church; that she was present when Kate was baptised, as was also Peter Lantz, his wife, Sophia Lantz, and Catherine Schelard. The defendants, on their part, produced Charles Haas, the pastor of the German Lutheran Church, who testified who were pastors of the church from 1852 to 1862, among whom was Rev. Mr. Miller. He also produced and proved the church records of baptism from 1852, and since, which record showed the "baptism of Catherine Sophia Barbara Lantz, daughter of Jacob and Barbara Lantz, born the eighteenth day of November, 1856, and baptised the fifteenth day of March, 1857. The witnesses were Sophia Lantz, Catherine Schelard, and Peter Lantz." This entry the witness testified was in the handwriting of Herman Miller, who was pastor of the church at that time. The entry appears in the regular order of dates. One date follows another in regular order, and the entries are numbered consecutively, and the number of the entry read was No. 28, and appears under date of March 15, 1857; the prior date being March 8, and the subsequent date being March 19, 1857. The witness testified that these records belong to the church, and that he has been its pastor since 1862. There was some evidence introduced showing what Kate Lantz and Sophia, her sister, testified about Kate's age upon that trial, to the effect that she was born in November, 1857.

This record respecting the baptism of Catherine Sophia Barbara Lantz was admitted in evidence without objection. It is too late now for counsel for plaintiff to claim that it was incompetent evidence, or that it was necessary to show that Mr. Miller was dead before it could be received. It was necessary, however, that the defendant should prove the identity of the person baptised as Catherine Sophia Barbara Lantz with the legatee known as Kate Lantz, and it was necessary for the jury to be convinced of that fact. It was therefore error for the court to refuse to submit to the jury the special question, as follows: "Is the 'Catherine Sophia Barbara Lantz' named in the records of baptism produced by Rev. Charles Haas, as having been born November 18, 1856, and baptised on March 15, 1857, the same person who prosecutes this suit as plaintiff, and who swears

that her full name is Catherine Sophia Barbara Lantz?" *Draycot v. Draycott*, 12 Vin. Abr. 89; *Birt v. Barlow*, 1 Doug. 170.

Error is assigned upon the refusal of the court to charge the jury that, if they believed that the record of baptism is true, their verdict must be for the defendant. The court charged that the record was not conclusive evidence of the facts appearing in it, but it was evidence to go to the jury under all the circumstances, and it was for them to give to it what weight they saw fit; and, after considering all the facts, if they believed the record of the minister was true, it would show the girl was of age, and therefore the plaintiff could not recover. We do not think the defendants can complain of this instruction. The record of the baptism, when admissible in evidence, is evidence of the date of baptism, but not of birth, although stated therein. (*Wilken v. Law*, 3 Starkie, 63; *Duins v. Donovan*, 3 Hagg. Ecc. 301; *Burghart v. Angerstein*, 6 Car. & P. 690; *Rex v. Clapham*, 4 Car. & P. 29; *Rex v. North Pethererton*, 5 Barn. & C. 508;) and the date of baptism was equally as important to defendants as that of the birth; for, if she was the person baptised on the fifteenth of March, 1857, she would be 21 years of age before the note matured in October, 1879.

Defendant's counsel also requested the court to charge the jury that if they found from the evidence that Kate Lantz gave John McKeown, executor of the estate of John T. McKeown, a receipt dated October 20, 1877, for her legacy, and at or about the same time received his individual note for said legacy payable October 20, 1879, and kept said note two years after she became of age, this was such an extension of time, without the consent of the sureties on McKeown's bond, as would discharge them from all liability; and their verdict must be for the defendants Abbott and Fowler. And he further requested the court to charge that when a minor holds a note a long time after she becomes of age, and does not disaffirm the contract, she being the active party, she is considered in law as ratifying the contract, and also that, if the jury should find that Kate Lantz became of age before the note became due, (October 20, 1879,) they must find for the defendants Abbott and Fowler; and in that case it did not matter when the note was given.

These requests do not state the correct principles of law to be applied to the facts of this case. Under any view of the testimony, Kate Lantz was not of full age when the note was made, and the receipt given. She was then incapable of giving such binding assent to an extension of time as would discharge the sureties, or of receiving the individual note of the executor in absolute payment of the legacy. The question, therefore, is, did she, after she became of age, ratify the arrangement by which the note was given? If she

did, the ratification would relate back to the time of the transaction, and so affect the undertaking of the sureties as to discharge them from liability. Ratification always resolves itself into a question of intention. The question, therefore, for the jury to determine was whether the facts were such as to justify an inference, properly to be drawn from them, of an intent on the part of Kate Lantz to ratify the reception of the note as payment of her legacy. Where no express ratification is shown, and no act done in reliance upon or in affirmance of the contract entered into by an infant, mere delay in proceeding to enforce her claim against the sureties cannot be construed into a ratification where there are no elements of estoppel that intervene; especially where the infant has not received any new consideration nor retains any consideration arising out of the original transaction. In this case McKeown's note did not give her any greater right of action against him than she had before. She was relinquishing a security which she had under the bond against the sureties, and receiving in its stead a negotiable note in which the day of payment was deferred. This, perhaps, would have been a sufficient consideration between parties capable of contracting; and, had she been of age, it certainly would have been sufficient to discharge the sureties in the bond, if made without their assent or approval. There is some testimony from which the knowledge, if not the assent, of at least one of the sureties might be inferred. It was proven that both the receipt and note were in the handwriting of one of the sureties, but, as this point was not made prominent, and was not relied upon, it need not be discussed now.

So far as the contract which was made between McKeown, the executor, and Kate Lantz affected the residuary legatee's bond, it was an executed contract, and it has been held that, in order to confirm an executed contract of an infant, all that appears to be necessary is to show any distinct acknowledgment or act indicating an intention to be bound by the contract; and if the infant continues, after coming of full age, to occupy a position which is only explicable upon the supposition that he intends to stand by his contract, it will be considered as a ratification of an executed contract. 1 Story, Cont. (4th Ed.) §§ 69, 72; *Tyler, Inf. & Cov.* §§ 40, 41; *Norris v. Vance*, 3 Rich. Law, 168. But, whether the contract be executed or executory, the question as to what acts will or will not amount to a confirmation is one of intention, and is one proper to be submitted to and determined by a jury under proper instructions from the court.

The judgment must be reversed, and a new trial granted.

CAMPBELL, C. J., and SHERWOOD, J., concurred.

HEATH v. STEVENS.

(48 N. H. 251.)

Supreme Court of New Hampshire. Grafton.
Jan., 1869.

In this case the parties agree upon the following statement of facts, reserving to each the right to go to the jury upon anything agreed to in this statement:

About the 1st of April, A. D. 1865, the plaintiff, Daniel C. Heath, went from his home in Danbury, in this county, to White River Junction, for the purpose of enlisting, in company with several others, and was rejected, and while there this plaintiff met the defendant, who had just returned from New York, and the defendant told the plaintiff what bounties were being paid in that state, and that they were much larger than at White River Junction. The plaintiff then informed the defendant that if he (the defendant) would pay his car fare out to New York, he would give him \$200 out of his bounty, if he was accepted; if he was not accepted, the defendant was to pay the plaintiff's fare back. The defendant did not ask or request the plaintiff to go, but the plaintiff did go with the defendant under the aforesaid agreement, enlisted for three years, and got \$700 bounty, and paid the defendant \$200, the defendant paying the plaintiff's expenses to New York. The plaintiff served some five months, and returned home.

At the time when the plaintiff went to New York with the defendant, and at the time when he made the aforesaid agreement, he was not 21 years of age. After the plaintiff returned home, he brought this suit to recover of the defendant the said \$200, which he had paid as aforesaid. Now, if the court shall be of the opinion that, upon the foregoing state of facts, the plaintiff can recover, then there is to be judgment for the plaintiff for that sum and for costs; otherwise for the defendant for costs.

Lord & Sulloway, for plaintiff. Mr. Murray, for defendant.

PERLEY, C. J. The plaintiff was not legally bound to perform his contract, made while he was an infant; but he voluntarily performed it before he became of age; and he is not here defending an action brought to enforce the contract, but he seeks to recover back money which he paid while under age in execution of the contract. Two objections are made to his right of recovery:

(1) That money paid by an infant in execution of his voidable contract cannot be recovered back.

(2) That the plaintiff must first restore what he received under the contract before he can rescind it, and recover back the money he paid in execution of the contract.

On the first of these points the decisions have not been unanimous. In *Holman v. Blogg*, 8 Taunt. 50, it was held that, if an infant pays money with his own hands without a valuable

consideration, he cannot get it back again; and where an infant paid money to A. as a premium for a lease, and enjoyed the same for a short period during his infancy, but avoided it after he became of age, it was decided in the same case that he could not recover the sum so paid in an action for money had and received against A. The doctrine of *Holman v. Blogg* was followed in *McCoy v. Hoffman*, 8 Cow. 84, in which case it was held that where an infant performs work in payment of his contract, or pays money on his contract, he cannot, by avoiding his contract, get back the money, or recover compensation for his labor. And in our case of *Weeks v. Leighton*, 5 N. H. 343, it was held, on the authority of *Holman v. Blogg* and *McCoy v. Hoffman*, that when an infant rescinds his contract on the ground of his infancy, he is not entitled to recover any compensation for labor he may have performed under it.

Weeks v. Leighton was directly overruled in *Lufkin v. Mayall*, 25 N. H. 83; and the later case of *Locke v. Smith*, 41 N. H. 346, is also to the point that an infant may recover for what he has done or paid under an executed contract, provided he restore, or account for, what he has received under the contract. *McCoy v. Hoffman* has been overruled in *New York* (*Milliard v. Hewlett*, 19 Wend. 391; *Medbury v. Watrous*, 7 Hill, 110; and *Holman v. Blogg* was questioned and evaded, if not directly overruled in *Corpe v. Overton*, 10 Bing. 252. The authorities are numerous in other jurisdictions that an infant, upon rescinding an executed contract, may recover for what he has done or paid under it, provided he restore, or account for, what he has received under the contract. *Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Pick. 572; *Judkins v. Walker*, 17 Me. 38; *Thomas v. Dyke*, 11 Vt. 272; *Taft v. Pike*, 14 Vt. 505; *Hill v. Anderson*, 5 Smedes & M. 216; *Tipton v. Jones*, Law, 552. And the questions must be considered as settled in this state by the recent cases of *Lufkin v. Mayall* and *Locke v. Smith*.

It is now extremely well settled that, if an infant would rescind his voidable contract, and recover back what he has paid under it, or compensation for what he has done under it, he must first restore the thing that he has received under the contract, if it remain in specie, and within his control; or, if not, must account for the value of it. But if what he has received has been consumed, or for any other cause cannot be returned in specie, he may recover for what he paid or did under the contract by deducting what he received, or the value of it, from the amount that he paid, or from the value of the services which he rendered. Thus in *Locke v. Smith*, 41 N. H. 346, the infant agreed to work for his board, and it was held that he might avoid the contract, and recover for his work what it was worth, though he could not restore what he had received; but that he must allow by way of deduction whatever his board was worth. "The infant cannot," say the court, "repu-

diate the contract so as to recover for his labor, and allow nothing for his board." Where the contract of the infant was executed before he became of age, and the nature of the case is such that he cannot restore in specie what he received under the contract, this does not prevent him from recovering what he paid, or for what he did, by allowing for the amount and value of what he received.

What, then, did the plaintiff receive from the defendant under this contract? Certainly not the bounty money paid to the plaintiff when he enlisted, for that never belonged to the defendant. He never had it, nor any right to it; and of course cannot ask that it should be restored to him. The consideration of the contract moving from the defendant was the information he gave respecting the bounties paid in New York, his payment of the plaintiff's fare to New York, and his undertaking to pay his fare back if he was not accepted as a recruit. The defendant paid the plaintiff's fare to New York, agreed to pay his fare back if he was not accepted, and took the risk of losing both, if he was not accepted. He also gave him the information which led to his enlistment and the receipt of the bounty money. The money paid for fare to New York the plaintiff could repay; but the other parts of the consideration of the contract cannot be restored. All the plaintiff can do in reference to them is to allow for them what the defendant ought in equity and justice to have.

As to the money paid by the defendant for the plaintiff's fare, the defendant, having received the \$200 stipulated by the contract, is in no view of the case entitled to have that money paid to him again. If it were paid to him, and he took it, it must be recovered back again in this suit. The law will not require him to pay over money in order to maintain an action, when the money paid must be recovered back in the same action. In the early case of *Baker v. Lovett*, 6 Mass. 78, the infant plaintiff had settled a claim for an assault and battery, and received a sum of money in full satisfaction. The court held that he was not bound by the settlement, but that the sum he had received should be deducted by the jury,

on trial, from the amount of his damages as found by them; and the plaintiff was not required to go through the idle ceremony of paying back the money he had already received in order that he might recover it again in that suit. In that case the plaintiff had received a sum of money under the contract by which he had discharged his claim to larger damages for the assault and battery. He repudiated the contract on the ground of infancy, and was allowed to maintain his action without repaying the money he had received on the contract by allowing it on trial towards his damages. The case of *Breed v. Judd*, 1 Gray, 457, involves the same doctrine, and is in the material facts substantially like the present. There the defendants had advanced money for the plaintiff's outfit to California, and in consideration of this the plaintiff promised them one-third part of his earnings while there, which he paid to the defendants accordingly before he was of age; and the action was brought to recover back the money. The money received by the plaintiff for his outfit was not repaid before the suit was brought, nor was this held to be necessary; but the court left it to the jury to find whether, under all the circumstances, and looking to the risks incurred by the defendants, the contract was reasonable; if so, that nothing could be recovered back.

We think the two cases of *Baker v. Lovett* and *Breed v. Judd* are authorities in point, and furnish the rule which must govern this case. It is not necessary that the money paid for the plaintiff's fare should be repaid before this suit can be maintained, but it must be allowed towards the claim of the plaintiff; and as to the whole question of what shall be allowed to the defendant it must be left to a jury to say what is a reasonable sum for the defendant to have on account of what he did and of the risks he took in this contract with the plaintiff, and allow the defendant such reasonable sum as under all the circumstances they think he ought in justice to have.

The case must be discharged, and the action stand for trial, as facts are not stated which will authorize the court to render a judgment.

ADAMS v. BEALL.

(8 Atl. 664, 67 Md. 53.)

Court of Appeals of Maryland. March 16, 1887.

Appeal from the Baltimore city court.

Albert Ritchie, for appellant. William Colton, for appellee.

ROBINSON, J. The appellee, while a minor, paid to the appellant \$2,900, as a consideration for being admitted as a partner in the appellant's business. The partnership continued for more than a year, and finding it unprofitable, the appellee, without formally dissolving the partnership, withdrew from the business. The question in the case is whether the appellee is entitled to recover of the appellant the money thus paid. His right to disaffirm the partnership contract, and to avoid all liabilities under it, including the partnership debts, is not denied. Being an infant when the contract was made, this is a privilege to which for his protection he is entitled. But when he seeks to recover money paid for a consideration which he has enjoyed or has had the benefit of, this presents quite another question. The \$2,900 was paid to the appellant in consideration of being admitted as a partner in his business. He was admitted as a partner, and continued to be a member of the firm for at least a year. The business was not, it is true, a successful one, but this, in the absence of fraudulent representations on the part of the appellant, cannot affect the question. We are dealing with a contract between an infant and adult, executed on both sides, and upon the faith of which money was paid by the infant for a consideration which he has enjoyed. The privilege of infancy, says Lord Mansfield in *Zouch v. Parsons*, 3 Burrows, 1804, was intended as a shield or protection to the infant, and not to be used as the instrument of fraud and injustice to others; and to hold that an infant has the right, not only to withdraw from a partnership at his own pleasure, and to subject the adult partner to the payment of all the partnership debts, but has the right also to recover money paid by him as a consideration for being admitted into the partnership, would be, it seems to us, to extend the privilege beyond any just principles upon which it is founded.

So long ago as *Brawner v. Franklin*, 4 Gill, 463, it was held that, where an infant advances money upon a contract, he cannot disaffirm the contract and recover the money advanced, if he has enjoyed the consideration for which the money was paid. *Holmes v. Blogg*, 8 Taunt, 508, is to the same effect. There the infant paid a sum of money as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoe-making. They occu-

pied the premises from March till June, when the infant dissolved the partnership, and brought an action to recover back the money he had paid the lessor for his lease. Gibbs, C. J., said: "He may, it is true, avoid the lease; he may escape the burden of the rent, and avoid the covenant; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it. The law does not enable him to do that."

It is a mistake to suppose that the principle on which this case was decided was either overruled, or even questioned, in *Corpe v. Overton*, 10 Bing, 252. In the latter case, the plaintiff, while an infant, signed an agreement to enter into partnership with the defendant, and to pay him £1,000 for a share in the business; and to execute, on the first day of January, a partnership deed, with the usual covenant. He also paid £100 as a deposit for the fulfillment of his part of the contract. The plaintiff afterwards disaffirmed the partnership contract, and never did in fact become a partner. The suit was brought to recover of the defendant the £100 paid by the infant as a deposit. Tindal, C. J., said: "The case was distinguishable from *Holmes v. Blogg*. In that case the plaintiff and partner occupied the premises from March till June, and the money was paid for something available, that is, for three months enjoyment of the premises. In the present case, the plaintiff paid to Overton £100, for which he has not received the slightest consideration. The money was paid either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. Now, the partnership was not to be entered into till January, 1833, and in the meanwhile the infant has derived no advantage whatever from the contract." Bosanquet, J.: "We are far from impeaching *Holmes v. Blogg*, as applicable to the facts of that case. Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. The £100 paid here was in the nature of a deposit. Money paid on a deposit may generally be recovered back where the contract goes off, and here the contract was defeated before the infant derived any benefit from it." Alderson and Gascoke, J.J., were of the same opinion. The plaintiff was allowed to recover the deposit money paid by him while an infant, because the partnership contract was disaffirmed by Corpe before the time agreed upon for it to begin. As was said by Alderson, J., "before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made." The distinction between *Holmes v. Blogg*, and *Corpe v. Overton*, is this: In the former the plaintiff was not allowed to recover the money paid by him while an infant, because it was paid on a consideration which he had in

part enjoyed, while in the latter the plaintiff was allowed to recover as upon an entire failure of consideration.

Passing, then, from these cases, we come to *Ex parte Taylor*, 8 De Gex, M. & G. 254, which is a case directly in point. There an infant paid a premium on entering into a partnership, and, before he came of age, disaffirmed the contract, and, upon the bankruptcy of the firm, attempted to prove for the premium thus paid. Lord Justice Knight Bruce said: "In my opinion, a case of fraud has not been established. That being so, the matter remains one of a contract fairly made, or as fairly made as a contract with an infant could be made, a contract upon which the infant acted during his minority, and which during his minority has been in part performed on each side. In such a state of things, I conceive that, if the bankrupts had continued solvent, and an action had been brought against them by the minor, either before or after majority, for the purpose of recovering the money in question, there must have been either a nonsuit or a verdict against him." Lord Justice Turner said: "It is clear, an infant cannot be absolutely bound by a contract entered into during his minority. He must have the right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question, whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but, if he

does pay for it during his minority, he cannot on attaining his majority recover the money back."

We have quoted at length from the preceding cases, because the question at issue is an important one, and comes before us for the first time for decision. And while fully recognizing the privilege which the law accords to minors in regard to contracts made during their minority, yet, in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remain a partner for a given time, he ought not to be allowed to recover back the money thus paid unless he was induced to enter into the partnership by the fraudulent representations of the appellant. Whether an infant can avoid a contract and sue thereon during his minority, or must wait until he arrives at age, is a question about which the decisions are conflicting. To hold that he cannot disaffirm a voidable contract until he attains his majority would in many cases work the greatest injustice to an infant. And where the contract is of a personal nature, or relating to personal property, we see no good reason why such a contract may not be avoided, either before or after his majority. *Stafford v. Roof*, 9 Cow. 626; *Shipman v. Horton*, 17 Conn. 481; *Willis v. Twambly*, 13 Mass. 204.

The court having erred in granting the plaintiff's first and second prayers, the judgment must be reversed. Judgment reversed, and new trial awarded.

MOLEY et al. v. BRINE.

(120 Mass. 324.)

Supreme Judicial Court of Massachusetts.
Suffolk. May 6, 1876.

Bill in equity to close up a partnership. At a former hearing, before Wells, J., the plaintiffs relied on an agreement signed by the three partners, of which the following is a copy: "Agreement made this third day of August, A. D. 1871, between J. B. Brine, P. J. Moley, and E. F. Jackson. The partnership heretofore existing under the firm of Brine Bros. & Co. is hereby dissolved. E. F. Jackson is alone authorized to sign the name of the firm in liquidation, make collections, pay bills, receive money, and draw checks, until the old business is settled as hereafter arranged. The other partners shall assist in closing up the business, except as aforesaid. From collections and assets, E. F. Jackson is to receive the sum advanced by him, \$4,874, without interest. The balance of assets and property, after paying debts, to be divided between Messrs. Brine and Moley, according to their interest in the business; that is to say, \$1,800, without interest, to Moley, and the balance to Brine. Brine takes the store and business. Brine and Moley assume the risk of all accounts and contracts up to August 1, 1871. All money drawn from the business after August 1, 1871, by P. J. Moley and E. F. Jackson is to be deducted from the above portion." Under that agreement Jackson had begun to liquidate the affairs of the firm prior to the filing of this bill.

It was then ordered: (1) That that agreement "be set aside and annulled as an agreement, the said Brine being a minor at that date, and having elected to avoid the same on that ground; and that said writing be taken to have no further or other effect than as evidence upon the question of the actual transactions and relations between the parties." (2) "That the case be referred to a master to hear the parties, and report to the court his findings as to the actual relations between the parties and their respective rights in and to the funds and assets that are now in or that may come into the hands of the receiver; and also to state the accounts between them."

The master's report stated the following facts: The partnership was formed about July 1st, and was dissolved by mutual consent on August 4, 1871. At the formation of the partnership, Jackson contributed to the common stock \$4,874, Moley \$1,800, and Brine \$882, and it was agreed that each should receive one-third of the profits. During the

continuance of the partnership Jackson drew out \$34, Moley \$100, and Brine \$673.15. There were no profits of the partnership, and the assets were not sufficient to pay back in full the original contributions.

At the final hearing before Colt, J., the plaintiffs contended that, no agreement being shown as to the division of the common stock upon a dissolution of the partnership, each partner was entitled to the amount of his contribution and interest, and that the deficiency in assets should be borne by the partners equally.

The defendant contended: (1) That the assets should be equally divided among the three partners, without regard to the amounts contributed by each. (2) That, if such was not the rule, then the deficiency should be borne by the several partners in proportion to the several amounts contributed by them, and that the defendant should not bear any part of the deficiency.

The case was reported for the consideration of the full court, such order or decree to be entered as the case required.

S. J. Thomas, for plaintiffs. M. A. Blaisdell, for defendant.

GRAY, C. J. The assets remaining upon the settlement of the business of the partnership, being less than the amount contributed by all the partners to the common stock, must be divided among them according to the amount of their contributions, and the deficiency must be borne by the partners in the same proportions in which they were to bear profits and losses; that is to say, in this case, equally. *Whitcomb v. Converse*, 119 Mass. 38.

This rule is not affected by the fact that the defendant is an infant. According to the agreement between the parties, he contributed less than one-eighth of the capital stock, and was to receive one-third of the profits of the business. He actually entered into the partnership, had the benefit of it while it lasted, and drew out the greater part of his contribution. The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his co-partners the obligation of making up the deficiency. *Breed v. Judd*, 1 Gray, 155; *Holmes v. Blogg*, 2 Moore, 552, 8 Taunt. 508; *Ex parte Taylor*, 8 De Gex. M. & G. 251; *Aldrich v. Abrahams, Hill & D.* 423, 425; *Medbury v. Watrous*, 7 Hill, 110, 112, 113; *Heath v. Stevens*, 48 N. H. 251.

Decree for the plaintiffs accordingly.

DUBE v. BEAUDRY.

(23 N. E. 222, 150 Mass. 448.)

Supreme Judicial Court of Massachusetts.
Essex. Jan. 2, 1890.

Report from superior court, Essex county; JOHN LATHROP, Judge.

Action by Joseph Dubé, *per prochein ami*, to recover from Theophile Beaudry for services rendered. The case was heard by the court without a jury. The court found for the defendant, and reported the cause to the full bench.

C. Sewall, for plaintiff. J. M. Raymond, for defendant.

FIELD, J. The plaintiff, a minor, with the assent of his mother, agreed with the defendant to work for him for eight dollars a week, one-half to be paid to the plaintiff, and the other half to be applied by the defendant to the payment of a debt due to the defendant from the estate of the deceased father of the plaintiff. The court, trying the case without a jury, found that the plaintiff's services were not worth eight dollars a week for the first part of the time he worked, but "were worth eight dollars a week for the whole time." The plaintiff's pay was raised from time to time, and, after he had worked for the defendant eight weeks, "his pay was raised to twelve dollars" a week. The defendant paid him four dollars a week for the whole time he worked, and applied the remainder of his wages to the payment of the debt against the father's estate. At the end of 26 weeks, when the debt had been paid, the defendant discharged the plaintiff from his employment. The court also found that "the agreement was not so unreasonable as to raise any suspicion of fraud;" "that the plaintiff had not been overreached;" and ruled, "as matter of law, that the plaintiff was not entitled to avoid the contract, it having been fully executed." It is clear that the court found that the whole amount of the wages agreed upon, from time to time, was as much as or more than the plaintiff's services were worth, but that the amount of money paid to the plaintiff was less than his services were worth. It is clear, also, that the plaintiff was not bound to pay his father's debts; that the contract made in this case was not for necessities, and was not necessarily beneficial to the plaintiff; and that by our decisions, in order to avoid such a contract, it is generally not necessary that the minor put the other party *in statu quo*, or return the consideration received. *Chandler v. Simmons*, 97 Mass. 598, 514; *Bartlett v. Drake*, 100 Mass. 174; *Walsh v. Young*, 110 Mass. 396; *Gaffney v. Hayden*, *Id.* 137; *Bradford v. French*, *Id.* 365; *Bakery v. Stone*, 136 Mass. 405; *McCarthy v. Henderson*, 138 Mass. 310. *Gaffney v. Hayden*, *ubi supra*, shows that, if the amount of the wages

agreed upon had not been as much as the plaintiff's services were worth, the fact that the plaintiff had received his pay while a minor would not prevent him from avoiding the contract, and suing on a *quantum meruit*. In the opinion, the cases of *Stone v. Dennison*, 13 Pick. 1, and *Breed v. Judd*, 1 Gray, 455, which the present defendant cites, are considered and distinguished.

It is suggested that the plaintiff's agreement that the defendant should apply a part of the wages to the extinguishment of the father's indebtedness makes the actual application of the wages by the defendant equivalent to a payment, in pursuance of this agreement, and before it was revoked, of money by the plaintiff to the defendant for the purpose of extinguishing this debt. It is argued that if a minor voluntarily pays money under a contract he cannot recover the money he has paid, when he has received any benefit from the contract, or any part of the consideration, except by rescinding the contract; and that a contract cannot be rescinded unless the other party is put *in statu quo*; and that, in the present case, it does not appear that the defendant can be put *in statu quo*, because he may have lost his remedy against the estate of the father. See *Shurtleff v. Millard*, 12 R. I. 272; *Robinson v. Weeks*, 56 Me. 102; *Sparman v. Keim*, 83 N. Y. 245; *Adams v. Beal*, 67 Md. 53, 8 Atl. Rep. 664; *Ex parte Taylor*, 8 De Gex. M. & G. 254. It does not appear that the plaintiff did or could receive any benefit, directly or indirectly, from paying his father's debts. It appears that the father died seized of real estate "which he devised to his widow," and which the widow conveyed to his eldest son, the brother of the plaintiff; but it does not appear that the plaintiff was entitled to receive any property from the estate of his father, and therefore it does not appear that the plaintiff had any interest in preventing the defendant from collecting the debt out of the estate of the father. The action is not to recover money paid. The contract, so far as it related to the payment of the father's debt, would, in ancient times, have been held absolutely void, if made by an infant. We think that the principle contended for, whether it is consistent or not with our decisions, is not applicable to this case. It is necessary for the protection of an infant that he should not be bound by a contract to pay out of his earnings the debt of another person, and the defendant had no right to rely upon such a contract, and forego any remedies he might have had against the estate of the father. The defendant cannot be said to have acted as agent of the plaintiff in paying the wages to himself, within the principle declared in *Welch v. Welch*, 103 Mass. 562, because he still retains the benefit. It is not contended that the mother was entitled to the wages of the plaintiff. By the terms of the report there must be a new trial. So ordered.

TRAINER v. TRUMBULL.

6 N. E. 761, 111 Mass. 527.)

Supreme Judicial Court of Massachusetts,
Suffolk. May 7, 1886.

This was an action of contract for articles furnished to the defendant, a minor, by the plaintiff. Hearing in the superior court, before Brigham, C. J., without a jury, who found the following facts: Defendant was a minor, who was born in January, 1868, and was the only child of George B. Trumbull, who died at the soldiers' home in Togus, Maine, November 1, 1883, where he had resided from 1876 and previously. Defendant's mother, who was the wife of said George B. Trumbull, was, on October 25, 1875, committed to the house of industry on Deer Island, Boston, and defendant was, on the same day, sent to the almshouse on said Deer Island as a pauper, and there remained until he was removed to the Marcella-street home for paupers and neglected boys and girls, in April, 1877. On November 17, 1877, the plaintiff removed defendant from said Marcella-street home to her home, he then being a pauper, and in a diseased and sickly condition, and there kept him to the time of bringing this action, and during all this period maintained defendant, providing him with food, clothing, lodging, medical attendance, and nursing when sick, and the means of education, at a cost to plaintiff, which, in addition to the reasonable value of her services in making such provision,—which the court ruled, as a matter of law, was a provision for necessities to defendant,—was not less than the sum stated in the account annexed to the declaration. Plaintiff, on a visit to Togus, and to the soldiers' home, in 1876, became acquainted with said George B. Trumbull, who exhibited much distress on account of defendant being an inmate of an asylum for paupers, and his reported sickly condition; stating to her that he, George B. Trumbull, had certain property bequeathed to him by one Susan Bryant, whose adopted son he was, which gave him only a small income, but that at his death the defendant would be worth \$10,000. Plaintiff, at said George B. Trumbull's request having informed herself of the provisions of the will of Susan Bryant, and of the terms of a lease to one Cutler, made by George B. Trumbull, of the property received from said Susan Bryant, and of the value and income of the estate to which it related, undertook and continued the maintenance of defendant as aforesaid, not in any respect relying upon the credit of said George B. Trumbull, but relying solely upon the credit of defendant's estate. One Teele, since November, 1883, as guardian of the defendant, has had possession and control of real estate in Boston of the value of about \$8,000, which constitutes all of defendant's property. At the close of plaintiff's case defendant offered no evidence, but requested the court to rule, as matter of law that upon all the facts in evidence on the part of the plaintiff this

action could not be maintained. The court refused to rule as requested, and ruled that upon the facts found the plaintiff was entitled to the sum stated in her account, found for the plaintiff, assessed damages in the sum of \$1,112.53, and ordered judgment for plaintiff for that sum; and the defendant alleged exceptions.

J. R. Smith, for plaintiff. Brown & Keyes, for defendant.

ALLEN, J. The practical question in this case is whether the food, clothing, etc., furnished to the defendant were necessities for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances; that is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied. *Angel v. McLellan*, 16 Mass. 31; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Cush. 512; *Barnes v. Toye*, 13 Q. B. Div. 410. So, on the other hand, the mere fact that an infant, as in this case, had a father, mother, and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay from the necessity of his situation; just as in the case of a lunatic. 1 Chit. Cont. 137; *Hyman v. Cahn*, 3 Jones (N. C.) 111; *Richardson v. Strong*, 13 Ind. 106; *Gay v. Ballou*, 4 Wend. 403; *Epperson v. Nugent*, 57 Miss. 45-47. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment, for necessities, the real value will be inquired into, and he will be held only for that amount. *Earle v. Reed*, 10 Mete. 387; *Locke v. Smith*, 41 N. H. 346; *Metc. Cont.* 73, 75.

But it is contended that the board, clothing, etc., furnished to the defendant were not necessities, because he, "being a pauper, and an inmate of an almshouse, was supplied with necessities, suitable to his estate and condition, and, under the circumstances, it would have been the duty of the guardian to place him in the almshouse." It is true that a guardian is not obliged to provide for the support of his ward when he has no property of the ward available for that purpose; and, if he has no other resource, no doubt he may, under such circumstances, place the ward in an almshouse. The authorities cited for the defendant go no further than this. *Spring v. Woodworth*, 2 Allen, 206. But this by no

means implies that a boy with expectation of a fortune of \$10,000 should be brought up in an almshouse if any suitable person will take him, and bring him up properly, on the credit of his expectations. On the other hand, it seems to us highly proper for a parent or guardian, under such circumstances, to do what the father did in this case; leaving it for the boy's guardian to see to it that an unreasonable price is not paid. Looking to the advantage of his subsequent life, as well as to his welfare for the time being, his transfer from an almshouse to a suitable person, by whom he would be cared for and educated, would certainly be judicious; and the support and education furnished to an infant of

such expectations, whose means were not presently available, fall clearly within the class of necessities. In *Metc. Cont.* 70, the authority of Lord Mansfield is cited to the point that a sum advanced for taking an infant out of jail is for necessities. *Earl of Buckinghamshire v. Drury*, 2 Eden, 72. See, also, *Clarke v. Leslie*, 5 Esp. 28. Giving credit to the infant's expectation of property is the same as giving credit to him.

There was no error in refusing to rule, as matter of law, that upon all the facts in evidence the action could not be maintained. The findings of all matters of fact, of course, are not open to revision. Exceptions overruled.

ENGLEBERT v. TROXELL et al.

(58 N. W. 852, 40 Neb. 195.)

Supreme Court of Nebraska. April 17, 1894.

Appeal from district court, Douglas county; Herbert J. Davis, Judge.

Action by Francis L. Englebert against Benjamin Troxell and others to recover possession of land. Judgment for plaintiff, and defendants bring error. Affirmed.

Geo. E. Pritchett and Switzler & McIntosh, for appellants. St. John & Stevenson and Chas. Offutt, for appellee.

RAGAN, C. On April 1, 1874, Mrs. Frances H. Englebert was the owner of lot 3 in Gise's addition to the city of Omaha. At that time she and her husband, J. Lee Englebert, executed a mortgage on said lot to Max Meyer & Bro., to secure a note of \$378.48, due July 1, 1874. Soon after that time, Mrs. Englebert and her husband removed to Des Moines, Iowa, in which city Mrs. Englebert died on the 29th of December, 1875. She died intestate, leaving her husband and one child, the appellee herein, then a boy about seven years of age. November 1, 1881, Max Meyer & Bro. brought suit in the district court of Douglas county against Mr. and Mrs. Englebert, only, to foreclose the mortgage above mentioned, and obtained service upon them by publication; Max Meyer & Bro. being then ignorant of the fact of Mrs. Englebert's death. December 17, 1881, George E. Pritchett, an attorney at law residing at Omaha, Neb., informed Mr. Englebert, by letter, of the pendency against him and his wife of Max Meyer & Bro.'s mortgage foreclosure suit, and requested to be authorized to appear in and defend the same. Various communications took place immediately afterwards between Pritchett and Mr. Englebert; finally culminating in an agreement between them that Pritchett should defend the foreclosure suit for Englebert and his minor son, and receive, as compensation for his services, one-half of whatever of the lot he might succeed in saving from the lien of the Max Meyer & Bro. mortgage. In pursuance of this agreement, on the 4th day of August, 1885, Mr. Englebert and his minor son conveyed to Pritchett, subject to the Max Meyer & Bro. mortgage, an undivided one-half of the aforesaid lot. Pritchett seems to have succeeded in having the foreclosure suit, as brought, continued from time to time, on one pretext or another, until August, 1884. In August, 1885, Max Meyer & Bro. filed an amended petition in their foreclosure suit, naming Francis Leon Englebert, the minor son of Mr. and Mrs. Englebert, a party defendant to the action. Pritchett filed an answer on behalf of Mr. Englebert to this amended petition, and (having been, by the court, appointed guardian ad litem for Francis Leon Englebert) also filed an answer in

the action for him. These answers admitted the execution and delivery of the note and mortgage described in the foreclosure suit; alleged that the legal title to the property was at the time of the execution of the mortgage in Mrs. Englebert; her death, and that the legal title to the real estate had descended to, and was then vested in, the minor son, Francis Leon Englebert; that the only interest that Mr. Englebert had in the property mortgaged was a life estate, as tenant by the curtesy of his deceased wife; and that the interest of the minor, Francis Leon Englebert, in the real estate, could not be sold to satisfy the mortgage debt, because the action, as against him, was not brought within 10 years from the date of the maturity of the note which the mortgage was given to secure. The court rendered a decree, and ordered the life estate, only, of Mr. Englebert sold to satisfy the amount found due on the mortgage. This life estate was sold under a decree, the property purchased by one of the plaintiffs in the foreclosure suit, and the sale confirmed. A deed was ordered, but never made, to the purchaser. On the 6th day of January, 1886, on the joint application of Mr. Englebert and his minor son, Mr. Pritchett was appointed guardian of the minor son by the county court of Douglas county, accepted the trust, and qualified therefor by taking the oath, and giving bond, as required by statute. On June 1, 1886, in pursuance of an agreement between Mr. Pritchett and Mr. Englebert, his son (then being about 18 years of age), in consideration of \$240 in cash then paid by Pritchett to Englebert, conveyed to Pritchett the remaining undivided one-half of the lot. On the 22d day of December, 1888, J. Lee Englebert died. On the 11th of October, 1889, Francis Leon Englebert became of age, and one month and three days thereafter, to wit, on the 14th day of November, 1889, brought this suit in equity in the district court of Douglas county, against the said George E. Pritchett and others who were claiming to be owners of some part of said lot under conveyances from Pritchett, to cancel and set aside the deeds hereinbefore mentioned, made by himself and father to Pritchett; alleging that at the time he executed said deeds he was seised in fee simple of the property, and was a minor. The district court rendered a decree canceling and setting aside said deeds, and awarding the plaintiff a writ of possession for said real estate. The case is before us on appeal.

The reported decisions, especially the older ones, abound with grave, learned and lengthy discussions of the question as to whether the contracts of an infant are void or voidable; and there are respectable authorities which hold that certain contracts of an infant, made under certain circumstances, are absolutely void; but we think that the better rule, and the one supported by the weight of authority, is that all contracts of an infant, except those for necessities, are voidable by

the infant, at his election, within a reasonable time after he becomes of age. In *Tunison v. Chamblin*, 88 Ill. 378, the rule is thus stated: "Deeds made by a minor are not void, but only voidable. Their validity does not depend on a ratification after a minor attains his age; but, to avoid them, he must, by some act, clear and unmistakable in its character, disaffirm their validity." See also, *Bonner v. Land Co.*, 75 Ill. 315; *Hyer v. Hyatt*, 3 Cranch C. C. 270, Fed. Cas. No. 6397; *Kendall v. Lawrence*, 22 Pick. 549; *Dixson v. Merritt*, 21 Minn. 196; *Manufacturing Co. v. Lamb*, 81 Mo. 221; *Irvine v. Irvine*, 9 Wall. 617; *Pom. Eq. Jur.* (2d Ed.) § 945. Such is also the doctrine of this court as stated in *Philpot v. Manufacturing Co.*, 18 Neb. 54, 24 N. W. 428, where it is said: "Contracts of an infant, other than for necessities, are voidable only; and, upon coming of age, he may affirm or avoid them, in his discretion." The deeds made by the appellee in this case to Pritchett were voidable, and not void. The appellee, within less than two months after his becoming of age, instituted this suit for the purpose of canceling the deeds made to Pritchett. This was, on the part of the appellee, an unequivocal and sufficient disaffirmance, on his part, of the contracts made. *Tunison v. Chamblin*, *supra*; *Sims v. Everhardt*, 102 U. S. 300.

Was the disaffirmance of these deeds by appellee made within a reasonable time? As to what is a reasonable time for an infant, after becoming of age, to disaffirm contracts made during his minority, is a mixed question of law and fact, to be determined from the circumstances in each particular case. In *Ward v. Laverty*, 19 Neb. 429, 27 N. W. 333, this court said: "A minor who has conveyed his real estate must disaffirm the deed within a reasonable time after becoming of age, or be barred of that right." In that case the disaffirmance was not made until more than three years after the minor became of age, and the court held that the disaffirmance, under the facts in the case, was not made within a reasonable time. In *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274, this court, adhering to the rule announced in *Ward v. Laverty*, held that a disaffirmance made by a party 14 years after he became of age was not made within a reasonable time. In *Johnson v. Storie*, 32 Neb. 610, 49 N. W. 371, an infant who had signed a note as surety disaffirmed the same a year and a half after he became of age; and it was held that the disaffirmance was made within a reasonable time. There are some eminent authorities which hold that an infant may disaffirm a deed, which he has made to his real estate during his minority, at any time, after he becomes of age, before he would be barred by the statute of limitations from bringing an action in ejectment for the real estate. But this is not the doctrine of this court. It is now firmly settled here that an infant, in order to avoid a contract made during his

minority, must disaffirm the same within a reasonable time after his minority ends. There can be no doubt, in view of the authorities quoted above, but that the appellee disaffirmed, within a reasonable time after he became of age, the deeds made to Pritchett.

It is insisted by the appellants that the first deed made by appellee to Pritchett was voidable only, and that the services performed by Pritchett in the foreclosure suit of Max Meyer & Bro. for the appellee were necessities, and that, therefore, the appellee cannot avoid said first deed. Were the services performed by Pritchett for the appellee in the foreclosure suit "necessaries," within the meaning of that term? What are necessities for an infant cannot be defined by any general rule applicable to all cases. It is a mixed question of law and fact, to be determined in each case from the particular facts, circumstances, and surroundings in that case. In *Shelton v. Pendleton*, 18 Conn. 417, a wife, without her husband's consent, employed an attorney to prosecute a suit for divorce in her favor, against her husband, for a legal and sufficient cause. The attorney performed the services, and the decree of divorce was granted. The attorney then sued both the husband and wife for his fees. The court held that the services rendered were not necessities, and that the husband was not liable therefor. The court said: "By the law the defendant is liable only for the necessities which the plaintiff has provided for his wife. The common law defines 'necessaries' to consist only of necessary food, clothing, drink, washing, medicine, instruction, and a competent place of residence." In *Munson v. Washbaud*, 31 Conn. 303, a female infant was seduced under a promise of marriage. Her seducer refused to marry her, and she was left in a state of destitution. At her request an attorney brought suit against the seducer for a breach of promise of marriage. The suit was settled by the intermarriage of the plaintiff and defendant. The attorney then sued both the husband and the wife for his services. The court held that the services rendered by the attorney, under the circumstances, were "necessaries," within the meaning of that term. The court said: "Can the plaintiff's charges for prosecuting that action be considered as necessities, under the circumstances? The rule usually stated in the text-books confines the term 'necessaries,' for which a minor may bind himself, to suitable food and clothing, shelter, washing, medicine, medical attendance, and education; but this depends entirely upon what the court or jury may think, in each case, suitable and proper in reference to the infant's condition and station in life. * * *

The personal security of the wife is legally a necessary, and the expense of securing it is a proper charge against the husband. If we look at the suit which the infant com-

menced as her only mode, under her peculiar circumstances, of procuring the means of living, it comes within the principle allowing her to contract for necessities. This was not a case of merely prosecuting an infant's right to property, or for recovery of an ordinary debt. In such cases there is, or ought to be, a guardian to protect the interests of the infant. There was none here, and it does not appear that there were any means practicable of procuring one to be appointed. It appears to us, therefore, that while the court recognized the rule that the ordinary fee of an attorney for the prosecuting of an infant's right to property could not generally be said to be a necessary, yet it correctly informed them that the services rendered were requisite for the personal protection and support of the infant, and might be lawfully contracted for by her, and that she would be liable to pay for the same." In *Wallis v. Bardwell*, 126 Mass. 366, it was held "that a ward is not liable for repairs put upon his dwelling house by a person employed by the guardian to make them, even after the death of the guardian, and evidence that repairs were necessary is immaterial." In *Tupper v. Caldwell*, 12 Mete. (Mass.) 559, it was held: "An infant is not liable for the expense of repairing his dwelling house, on a contract made by him therefor, although such repairs were necessary for the prevention of immediate and serious injury to the house." The court said: "An infant may make a valid contract for necessities, and the matter of doubt in the present case is what expenditures are embraced in the term 'necessaries.' It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him, in a pecuniary point of view. That proposition is by no means true, if, by it, it be intended to sanction an inquiry, in each particular case, as to whether the expenditures or articles contracted for were beneficial to the pecuniary interest of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial, or, in other words, they must belong to a class of expenditures which are, in law, termed 'beneficial to the infant.' What subjects of expenditures are included in this class is a matter of law, to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper in the particular case, and this may present a question of fact. It is therefore a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems necessities; and, unless that be shown, it is not competent to introduce evidence to show that, in a pecuniary point of view, the expenditure was beneficial to the minor." See, also, *Price v. Sanders*, 60 Ind. 310; *Mathers v. Dobschuetz*, 72 Ill. 438; *Bloomer v. Nolan*, 36

Neb. 51, 53 N. W. 1039. In *Turner v. Gaither*, 83 N. C. 357, it was held that money furnished an infant to enable him to acquire a professional education was not a necessary. In *Deedl v. Lowenthal*, 57 Miss. 331, it was held that money furnished an infant to enable him to carry on a plantation was not a necessary. In *Barker v. Hibbard*, 51 N. H. 539, it was held that the services rendered by an attorney in defending an infant in a bastardy proceeding were necessities. In *Anding v. Levy*, 57 Miss. 55, it was held that where an infant had no guardian, and the services rendered by an attorney were beneficial to the infant's estate, he was liable for such services. In *Connolly v. Hull*, 3 McCord, 6, and in *Kline v. L'Amoureux*, 2 Paige, 419, it was held that if an infant was living with his parents or guardian, and properly maintained by them, his contract, even for necessities, was not binding. In the case at bar, when the appellee made the first deed to Pritchett, in consideration that he would defend the Max Meyer & Bro. mortgage foreclosure suit, he was living with his father,—his natural guardian; so that, if we held that the services rendered by Pritchett in the foreclosure suit were necessities, still the appellee would not be bound to pay for the services, if this was a suit by Pritchett on the contract made for that purpose. In the light of the authorities quoted above upon this subject, we are clearly of the opinion that the services rendered by Mr. Pritchett in the foreclosure suit cannot be considered necessities, under the facts of this case.

Another contention of the appellants is that the appellee has not restored the consideration he received from Pritchett for the execution of the two deeds which he seeks to cancel by this suit, and that, therefore, he cannot maintain this action. There are many authorities which hold that it is not necessary—to enable an infant, on coming of age, to disaffirm a contract made during his minority—to restore or return, or offer to restore or return, as a condition precedent to his right to disaffirm such contract, the consideration which he received therefor; but the rule of this court is otherwise. In *Philpot v. Manufacturing Co.*, 18 Neb. 54, 21 N. W. 428, the rule is thus stated: "If an infant purchase personal property, and give his note therefor, he cannot upon arriving at the age of twenty-one years, retain the property, and plead infancy as a defense to the note." This is a somewhat loose statement of the rule. The rule is concisely and correctly stated by Post, J., in *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, in this language: "One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return an equivalent for such part thereof as may have been disposed of by him during

his minority." That is to say, the infant, on coming of age, and electing to disaffirm a contract made by him during his minority, must restore or return so much of the consideration received by him in consideration of executing the contract as he then has, in specie, in his possession. The language of the authorities is that he must return or restore whatever of the consideration he then has, not that he is to pay to the party with whom he made the contract an equivalent for that which he received from said party. In *Reynolds v. McCurry*, 100 Ill. 356, the rule is thus stated: "It is a general rule that where the consideration of a conveyance by an infant has been expended, so that he is not in a condition to restore it, he may nevertheless avoid the conveyance. It is only when he still has the consideration that he will be compelled to return it." See, also, *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942. In *Chandler v. Simmons*, 97 Mass. 508, the rule is stated in this language: "If money paid to a minor as a consideration for his conveyance of real estate has been wasted or spent by him during his minority, payment or tender of the amount is not necessary, to enable him to avoid the conveyance." The Iowa Code provides that a minor is bound by his contract, unless he disaffirms it, and restores to the other party all money or property received by him by virtue of his contract, and remaining within his control. Construing this section of the Code, the supreme court of Iowa, in *Hawes v. Railroad Co.*, 64 Iowa, 315, 20 N. W. 717, held that, where a minor had disaffirmed a contract, he was only required to return the identical money or property received by him for the execution of such contract remaining in his possession at the time of his disaffirmance thereof. The court said: "It is not shown or pretended that he had remaining under his control, at any time after attaining his majority, the money or property received by him by virtue of the contract, and it is only such money or property as may thus remain that he is bound to restore."

So far as the consideration for the first deed made by the appellee to Pritchett is concerned, the only consideration which it is claimed appellee received for such deed was the services rendered by Mr. Pritchett in defending the Max Meyer & Bro. foreclosure suit. There are several things to be said of those services. In the first place, but for the voluntary intervention of Mr. Pritchett in that suit, we are led to believe, from the record before us, that Max Meyer & Bro. would have proceeded to decree of foreclosure against the father and mother of appellee only, notwithstanding that the appellee's mother was dead at the time the foreclosure suit was brought, and the title to the real estate had vested in the appellee. Such a decree would not have been binding upon the appellee, and would not have deprived him of the right, at least, to redeem his

property from such decree, if such decree would have in any manner interfered with appellee's title. Again, at the time Mr. Pritchett rendered these services, he was an officer of the court in which the foreclosure suit was pending, and had been by the court appointed guardian ad litem for the appellee. He had accepted this appointment, and was acting for the appellee. Section 14, c. 7, Comp. St. 1893, then and now in force, provides: "It shall be the duty of every attorney to act as the guardian of any infant defendant in any suit pending against him when appointed for that purpose by order of the court; he shall prepare himself to make the proper defense to guard the rights of said defendant and shall be entitled to such compensation as the court shall deem reasonable." In view of this statute, and in view of the circumstances under which Mr. Pritchett rendered the services for the appellee in the foreclosure suit, we are constrained to say that, if such services had been necessities, nevertheless the appellee's contract, by which he paid Pritchett one-half the real estate in litigation in consideration of the services, would have still been voidable, at the suit of the appellee. It was the duty of Pritchett to render the services he did. This was a duty imposed upon him by law, and resulting from his profession. For performing the duties of a guardian ad litem, an attorney must look, and look only, for the amount of his compensation, to the court; and the compensation allowed the guardian should be taxed as costs in the proceeding, and as such collected. Perhaps it might be filed as a claim against the minor estate, but no other, different, or greater amount can be collected than that allowed by the court. Whatever may be said of the services rendered by Mr. Pritchett in the foreclosure suit for the appellee, such services, of course, cannot be returned in kind.

The consideration for the second deed was \$240 in money paid by Pritchett to appellee's father. It is not claimed or pretended that this money, or any part of it, ever came into the possession of the appellee. It appears that the appellee's father bought a piano with this money, and gave it to appellee, and that he still has it. But the appellee was under no legal obligations to offer or tender or surrender this piano to Pritchett, as a condition precedent to his right to disaffirm the deed. Nor was the appellee under any legal obligation, as a condition precedent to his right to disaffirm the deed, to repay Pritchett the money which he had paid appellee's father in consideration of the execution of the deed. At the time appellee disaffirmed these deeds and brought this suit, there was in his possession no part of the consideration parted with by Pritchett at the time appellee executed the deeds.

The final contention of the appellants is that, the appellee having executed the deeds, he is, in equity, estopped from disaffirming

them, as against innocent purchasers. This is a remarkable argument, in view of the record in this case. Not one of the appellants is an innocent purchaser of any part of this property, in any sense whatsoever. There is in all this record not one word of evidence that the appellee, by any act or omission of his, either before or after his coming of age, induced either of the appellants to purchase any of the property in this suit. Certainly the appellants, as purchasers of this property, were bound by such notice as the public records of Douglas county afforded of the fact of the infancy of the appellee. Had appellants, intending to purchase this property, exercised ordinary care, and looked into the records of Douglas county as to the title of this property, they would have found the title to the same in appellee's mother in 1874. They would have found the record of the foreclosure suit of Max Meyer & Bro. They would have found that the decree in that case found that the

title of this property had passed to appellee; that he was at that time an infant. They would have found the first deed from appellee to Pritchett, antedating the decree in the foreclosure suit. They would have found of record in the office of the probate court of Douglas county the very day and hour of appellee's birth; the finding by that court that appellee was a minor in 1888, giving his age; the appointment by that court on that date of Pritchett, as his guardian. Certainly, these records were sufficient to have protected the appellants, had they looked for them. If they did not examine the records, and chose to rely upon the ability of their grantors to make good the title for them, they have no one of whom to complain. Certainly, they are in no position to invoke the aid of this court in this case to protect them as innocent purchasers; and, besides, there is no such thing as an innocent purchaser of a minor's property. The decree of the district court is affirmed. Affirmed.

WOOD v. LOSEY.

(15 N. W. 557, 50 Mich. 475.)

Supreme Court of Michigan. April 25, 1883.

Error to circuit court, Jackson county.

A. B. Haynes, for appellant. Hammond, Barkworth & Smith, for appellee.

CAMPBELL, J. Defendant was sued for the price of a horse sold him by Emery Wood, a brother of plaintiff, who claimed as assignee. The suit was brought before a justice while the defendant was an infant, and this appears of record. He was still an infant when the judgment rendered against him by the justice was appealed. Judgment was rendered against him, also, in the circuit court for Ingham county. It appeared that defendant had been garnished by a creditor of Emery Wood, and had paid the money over. But in the present suit this was not, so far as appears, established to have been before some notice of the assignment. Defendant was also prevented, by the ruling of the court, from showing fraud in the assignment. If the case could stand unreversed upon the other matters, we should wish to consider whether a garnishee who has disclosed and paid over money to creditors would not be entitled, when sued on the same debt, to show that the assignment was not valid as against the creditors who garnished him, and who had, if it was fraudulent, a right to complain themselves of the assignment. While we do not find ourselves called on to pass upon this allegation of error, we do not wish to have it understood that it is regarded as unfounded. We leave it for future consideration.

We think the jury was clearly misled by the course taken below on the subject of infants' contracts. While the court in the charge did undoubtedly charge that the plaintiff must show the horse to have been a necessity to the defendant, the force of this was destroyed by the other charges and refusals to charge. The plaintiff—although the defendant appeared only as an infant and his infancy was admit-

ted—made no attempt to do any more than prove the sale of the horse as if made to a person of full age. When he rested he had made out no cause of action. If he recovered at all it could only be because the defendant (who was very unnecessarily called on by whoever represented his interests to show by way of defense what the law presumed in his favor) made out a clear case of necessity. The fact that the defendant assumed the burden did not in any way exonerate plaintiff from making out a full case of actual necessity. The burden did not cease to be the plaintiff's burden. Defendant showed that he was carrying on his mother-in-law's farm for a third of the produce, and that she was to furnish all the teams, tools, and implements. He had no other business.

This showed quite clearly that the horse was not necessary for defendant, and the court should not have refused to so charge. By refusing this charge, and by giving the jury to understand, as we think they could not fail to understand, that it was the necessity for the farming business, and not the necessity for the defendant's part in it, that would make him liable, they were led to a verdict which has no testimony to sustain it. We have had some doubt whether we could properly grant a new trial upon the reversal. The defendant was not brought into the case so as to be impleaded in the way the statute points out. The guardian does not, on the original record, appear to have been properly appointed, and he, and not the defendant, had charge of the original defense and appeal. We are strongly inclined to regard the whole proceedings as too defective to bear investigation. Defendant did not assign error on this point, but it is open on the record, where the issues indicate error, and may stand in the way of any future judgment for plaintiff. As the assignments of error now stand, we shall reverse the judgment, with costs of both courts up to this time, and allow a new trial, if the plaintiff sees fit to incur the risk.

The other justices concurred.

BROCKWAY v. JEWELL.

639 N. E. 470, 52 Ohio, 1873

Supreme Court of Ohio. Dec. 18, 1891.

Error to circuit court, Trumbull county.

Action by one Jewell, guardian, against James W. Brockway. There was a judgment of the circuit court reversing a judgment of the common pleas for defendant, and he brings error. Judgment of the circuit court reversed, and that of the common pleas affirmed.

The action below was commenced before a justice of the peace by defendant in error against plaintiff in error, in replevin, to recover a single harness, with gilt trimmings. On appeal to the court of common pleas the plaintiff below filed his petition, the defendant below filed his answer, but there was no reply. A trial before a jury resulted in a verdict for defendant below, finding him to be the owner of the harness, and assessing his damages at \$30. A motion for a new trial was filed by the plaintiff below, the seventh ground of which is founded upon a supposed error in the charge of the court, appearing in the opinion later on. The motion for a new trial was overruled, and judgment rendered on the verdict, to which plaintiff below excepted, and filed his petition in error in the circuit court of Trumbull county, which court, on hearing the case, reversed the judgment on the sole ground that the court of common pleas erred in giving the charge as set out in the seventh ground of the motion for a new trial. Thereupon defendant below (plaintiff in error here) filed his petition in error in this court to reverse the judgment of reversal of the circuit court.

C. S. Darrow and E. B. Leonard, for plaintiff in error. George H. Tuttle, for defendant in error.

BURKET, J. (after stating the facts). The facts and circumstances out of which this action grew, as shown by the record, are as follows: On and before March 1, 1885, Grove E. Clark and the defendant below, James W. Brockway, were close friends, and frequently went about the country together. Mr. Clark had inherited quite a fortune, and fell into the habit of drinking to excess, and had spent some \$10,000 of cash, and often borrowed of his friends. Matters grew so bad that on the 2d day of March, 1885, application was made to the probate court of Trumbull county for the appointment of a guardian for Mr. Clark, on the ground that he was an inebriate. Notice of this application was served on Mr. Clark on the 4th or 5th day of March, and Mr. Brockway had notice of the application on the same day. The application was set for hearing on March 9th, and was continued, and the appointment of the guardian was finally made on March 23, 1885. About the last of February, 1885, Mr. Clark took sick at the Sawdy Hotel, at

Kinsman, in Trumbull county, and was in a condition to require the services of a nurse to wash and cleanse him and his clothes and bed, and he employed the defendant below to nurse him during his sickness, and in payment for his services agreed to supply him with a harness. Defendant accepted the employment on the terms named, and at once went to the harness shop, and looked over the stock on hand, and, among others, the harness in question, but made no selection at that time. Defendant nursed Mr. Clark for about two weeks from and after the last day of February or 1st day of March, under and in pursuance of this contract between them. On the 10th day of March, Mr. Clark gave defendant below an order on the harness maker for the harness, which was presented the same day, and not honored. Thereupon Mr. Clark and defendant on the same day went to the harness shop together, and Mr. Clark requested the harness maker to let defendant have the harness, which was agreed to. Afterwards, on the same day, the harness maker delivered the harness to defendant, in the absence of Mr. Clark, and afterwards, on the same day, in the absence of defendant, received from Mr. Clark his note for \$30 for the harness. Defendant retained the harness until about May 1, 1885, when it was taken from him in this action of replevin.

The petition in the common pleas avers that defendant, at the commencement of this action, and for 10 days before that time, wrongfully detained from plaintiff the following goods and chattels of the plaintiff, as guardian, to wit, one single harness, with gilt trimmings. It will be noticed that this petition does not claim that the defendant detained the property for a longer period than 10 days before the suit was commenced, and does not aver that plaintiff, as such guardian, was owner of the harness for a longer period than the 10 days during which the property was so detained. The answer admits that the case came into court by appeal, and denies each and every other allegation therein contained. The answer further avers that at the time of the commencement of the action the defendant was lawfully in possession of the harness; that he was the owner thereof, and that it was delivered and given to him in good faith, as a consideration for necessities furnished to Grove E. Clark, who was then owner of the same; and that said necessities so furnished consisted of care and nursing of said Clark while he was in a fit of sickness. The ownership and rightful possession of the harness at the time of the commencement of the suit, and for 10 days previous thereto, is clearly put in issue by both the general denial and the further averment that defendant was the owner and had lawful possession thereof, and this is as far as any issue is made up by the pleadings. The defendant goes further in his answer, and shows how he became owner, and avers

that Mr. Clark was owner of the harness at the time it was delivered to defendant as a consideration for necessities furnished to him. No reply appears in the record, so that the manner of acquiring ownership is not denied; and it stands admitted that the harness was delivered and given to defendant in good faith, as a consideration for care, nursing, and necessities furnished to Mr. Clark while he was in a fit of sickness. The time of the sickness and of the delivery of the harness does not appear in the pleadings, but the testimony shows that it was the last day of February or forepart of March, as above stated.

There is no inconsistency in the pleadings, and the latter part of the answer does not modify or contradict the general denial. While the answer avers that at some time Mr. Clark was owner of the harness, and that he delivered it to defendant below, it was claimed upon the trial, as one defense, that the title to the harness was never in Mr. Clark, but passed directly from the harness maker to the defendant; and evidence was introduced, without objection, and the trial proceeded upon that theory, notwithstanding the state of the pleadings. If the charge of the court excepted to had reference to this phase of the case, as so made by the evidence, it was clearly right, because, if defendant below did not derive title to the harness from Grove E. Clark, but from the harness maker, his title was unimpeachable. That the court had the right to submit the case to the jury upon the evidence introduced, notwithstanding the state of the pleadings, is shown by the case of *Mehurin v. Stone*, 37 Ohio St. 49-58. As another phase of the case, the defendant below claimed that the contract of hiring and promise to pay for the services rendered by delivery of the harness completed the sale, if sale there was, as of the date of the hiring, even though the harness was handed over by the harness maker some days later. As still another phase of the case, the defendant below regarded the delivery of the harness as a payment for services rendered under a contract made before application was made for the appointment of a guardian for Mr. Clark. Opposed to these three phases of defense, the plaintiff below regarded the transaction as a sale of the harness by Mr. Clark to defendant below, after notice of the application for the appointment of a guardian, and therefore void under the statute.

Upon the phase of a sale of the property as claimed by the parties the court charged the jury as follows: "The court says to you, as matter of law, that to constitute a valid sale of this harness by Clark to Brockway it must have been before Brockway had notice of the application for the appointment of a guardian for Clark, and any sale after notice upon Brockway would confer no title upon the defendant." To this charge there was no exception. Upon the phase of the

case that the delivery of the harness was in payment of the services rendered under the contract of hiring, the court charged the jury as follows: "You are further instructed that if you find from the evidence that Grove E. Clark and the defendant entered into an agreement, prior to the time of the filing of this application for guardian, or before he had notice of the same, that in consideration of services rendered by the defendant said Grove E. Clark would purchase a harness for the defendant, and that pursuant to such an agreement the services were rendered as agreed, and that said harness was selected by the defendant, and delivered to him by James Clark (the harness maker), upon the order, either verbal or written, of said Grove E. Clark, and that the harness remained in the possession of the defendant until taken on the writ of replevin in this case, then you should find for the defendant, and assess him such damages as is shown to you that this property was worth at the time it was taken." There was an exception to this part of the charge, which resulted in the reversal of the judgment of the court of common pleas. A transfer of property for cash is a sale by one and a purchase by the other. It is not a sale by both, nor a purchase by both. A party who hires a hand may pay him in cash or personal property, and the receipt of the property instead of cash is not a purchase by the hand, but a payment to him. Whether a delivery of the harness to defendant below was a sale or payment depends upon the circumstances. If Mr. Clark was in a fit of sickness, and required a nurse to take care of him, and applied to defendant, and said to him, "If you will nurse and take care of me, I will give you a harness as compensation," and defendant having accepted and rendered the service, and received the harness, the delivery of the harness was clearly a payment. On the other hand, if the defendant below desired to procure a harness, and applied to Mr. Clark therefor, and proposed that if Mr. Clark would deliver to him a harness he would work for him to the value of the same, or nurse and take care of him in payment therefor, and in that way obtained the harness, such transaction was a sale on the part of Clark, and a payment on the part of defendant. There was evidence strongly tending to show that Mr. Clark was seeking a nurse, that he stood in sore need of one, and agreed to make payment by the delivery of a harness, and that defendant below accepted the offer, rendered the service, and received the harness as payment therefor. Such a transaction is not prohibited by section 6318, Rev. St., which is as follows: "At least five, and not more than ten, days prior to the time when the application for the appointment of the guardian authorized by the foregoing section shall be made, a notice, in writing, setting forth the time and place of the hearing of the application, shall be

served upon the person for whom such appointment shall be sought; and from the time of the service of such notice until the hearing, or the day thereof, as to all persons having notice of such proceeding, no sale, gift, conveyance, or incumbrance, of the property of such intemperate person or habitual drunkard, shall be valid." It will be noticed that the inebriate is not prohibited by this section of the statute from making either purchases or payments. Only sales, gifts, conveyances, and incumbrances are prohibited. If the transaction was as claimed by defendant, the charge was correct. Defend-

ant had a right to have this phase of the case submitted to the jury, and let the jury pass upon the question, and say whether the real transaction was as claimed by himself or as claimed by the plaintiff. The phase of the transaction as claimed by each was fairly submitted to the jury. True, the charge complained of is not as clear and definite as it might be, but clearness would only have made the case more favorable for the defendant. In reversing the judgment of the court of common pleas the circuit court erred. Its judgment will therefore be reversed, and that of the common pleas affirmed.

STANNARD v. BURNS' ADM'R.

(22 Atl. 460, 63 Vt. 244.)

Supreme Court of Vermont. Rutland. May 1, 1891.

Exceptions from Rutland county court; Taft, Judge.

The defendant was the administrator of Michael Burns. The plaintiff's account was for necessities furnished Burns in his lifetime, and was duly presented to the commissioners on his estate, who disallowed it. During all the time covered by the account Burns was under guardianship, having been adjudged an insane person by the probate court. While the first part of the account was accruing, this fact was not known to the plaintiff; afterwards, it was. As to the character of the insanity, the court found: "During the time covered by the account Burns was a feeble, insane old man, living in his own house, cared for by Bridget Manghan. Both Burns and Bridget were not on friendly terms with the guardian; and, when the latter applied to Bridget to learn if anything was needed for Burns, he was told that Burns was not in want, and did not at the time know of the loans by the claimant to Burns until the latter's death. Had Bridget made known to the guardian the wants or needs of Burns, they would have been supplied by the guardian."

George E. Lawrence and F. S. Platt, for plaintiff. W. H. Preston and J. C. Baker, for defendant.

START, J. It appears from the statement of facts filed in the county court that Michael Burns was adjudged an insane person, and a guardian appointed over him, in February, 1888; that Burns lived in his own home, and was cared for by Bridget Manghan; that while Burns was under guardianship the plaintiff rendered services for him, and from time to time loaned him money, and the same was used by Bridget Manghan in the purchase of necessities for his support. The statement of facts, and the fair inferences to be drawn from them, would warrant the court in finding that the "insanity" which the probate court found as a ground for appointing a guardian was not of that character which disqualified the ward from entering into a valid contract for necessities. It does not necessarily follow, when there has been an adjudication by the probate court that a person is insane, that the insanity is of that character which disqualifies him from making a valid contract for necessities. *Motley v. Head*, 43 Vt. 633; *Blaisdell v. Holmes*, 48 Vt. 492. In the last-named case the plaintiff was permitted to recover of the defendant for services rendered for him under a contract made with him after he had been adjudged an insane person by the probate court, and while he was under guardianship. In *Motley v. Head*, *supra*, the plaintiff sought to recover

for money paid out for the defendant after he was adjudged an insane person, and while he was under guardianship. The adjudication of insanity was relied upon in defense, and the court held that the adjudication, to be available, should have been accompanied with evidence showing that the insanity was of that character which disqualified the defendant from making a valid contract. Judgment affirmed, and cause certified to the probate court.

THOMPSON, J. (dissenting). The majority of the court affirm the judgment below on the ground that the items of plaintiff's account were necessities, furnished by him to defendant's testate under such circumstances as to entitle plaintiff to recover therefor. I am unable to concur in this opinion and decision. It was conceded on hearing that judgment was rendered in the county court for the plaintiff to recover \$102.64, although this fact does not appear from the exceptions. The trial in the county court was by the court, who filed a statement of facts signed by the judges, and this court is confined to a consideration of the facts thus found. Laws 1888, No. 56, § 1. The county court found that the first nine items of plaintiff's account, with interest from October 13, 1888, to date of judgment, amounted to \$102.64, the amount for which judgment below was rendered. That said nine items are as follows:

1887.	
(1) Dec. 27. Michael Burns to one day at Rutland	\$ 2 00
(2) " " Car fare and hotel.....	75
1888.	
(3) Feb. 7. " " " "	2 75
(4) June 5. " " " "	2 75
(5) " " S. Cash	40 00
(6) Aug. 15. " " " "	10 00
(7) Oct. 1. " " " "	30 00
(8) " " " " " " " "	2 00
(9) " " " " " " " "	1 40

That the plaintiff's testate, Michael Burns, was adjudged to be an insane person, February 7, 1888, and a guardian appointed over him February 11, 1888, by the probate court for the district in which he then resided, and that the guardian duly accepted the appointment. That at the time items Nos. 1, 2, 3, 4, and 5 were contracted the plaintiff had no knowledge that Burns had been adjudged insane and a guardian appointed, but he had such knowledge when items Nos. 6 to 9, inclusive, accrued. That during the time covered by the account Burns was a feeble, insane old man, living in his own house, cared for by Bridget Manghan. That both Burns and Bridget were not on friendly terms with the guardian, and when the latter applied to Bridget to learn if anything was needed for Burns he was told that Burns was not in want, and did not at the time know of the loans by the claimant to Burns until the latter's death. That, had Bridget made known to the guardian the wants or needs of Burns, they would

have been supplied by the guardian. That the services were rendered and cash paid as charged in the account. That "the money specified in items Nos. 5, 6, and 7 was used by Bridget Maughan in the support of, and necessities for, the testate." That Burns died July 14, 1889. That after the first nine items had accrued the claimant presented his account to the guardian, and he promised to pay the items of a date prior to the appointment of the guardian, but told the plaintiff he would not pay the items charged during the guardianship.

As the plaintiff did not except to the disallowance of items Nos. 10 to 14, inclusive, of his account by the court below, it is unnecessary to consider them. No facts, except as above stated, were found bearing upon the question whether Burns was in need of necessities, or in regard to whether the items of plaintiff's account were in fact necessities for Burns at the time they accrued.

An insane person, whether under guardianship or not, may be bound by his contract for necessities, if made in good faith by the other party, and under circumstances which justify the contract. 1 Pars. Cont. 387; Chit. Cont. (10th Am. Ed., by Perkins) 159; Seaver v. Phelps, 11 Pick. 394; McCrillis v. Bartlett, 8 N. H. 569; Sawyer v. Lufkin, 56 Me. 308. The liability of an insane person and of an infant for necessities stand on the same footing, and are governed by the same rules of law. Mete. Cont. 79; Thompson v. Leach, 3 Mod. 310; 2 Greenl. Ev. § 369; Seaver v. Phelps, supra; Lincoln v. Buckmaster, 32 Vt. 652, which cites with approval Seaver v. Phelps, supra; Sawyer v. Lufkin, supra. The law allowing infants and lunatics to bind themselves by their contracts for necessities is solely for their benefit, and intended as a shield, not as a sword, to their hurt. It is well settled that it is a question of law whether the articles furnished to an infant are of the name and quality coming within the term "necessaries," and a question for the jury to determine to what extent the articles of that denomination were necessary to the particular case. In Thrall v. Wright, 38 Vt. 494, which was an action to recover for alleged necessities furnished defendant, a minor, it was held that, although the articles sued for are in the class denominated "necessaries," yet the burden of proof rests on the plaintiff to show affirmatively that they were in fact necessary for the infant when furnished. Reeve, Dom. Rel. *227, *228; Bainbridge v. Pickering, 2 W. Bl. 1325; Ewell, Lead. Cas. 62, 63. In Johnson v. Lines, 6 Watts & S. 80, which was an action to recover for alleged necessities furnished defendant, a minor, and under guardianship, the court say: "The rule of law is that no one may deal with a minor. The exception to it is that a stranger may supply him with necessities proper for him, in default of supply

by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure at his peril." Kline v. L'Amoureux, 2 Paige, 419; Pearl v. McDowell, 3 J. J. Marsh. 658. Reason and a sound public policy require that a plaintiff seeking to recover for alleged necessities furnished an insane person should be held to the same measure and rule of proof as above laid down in the case of an infant, especially where the insane person is under guardianship. To hold otherwise would make the appointment of guardians to an insane person under our statute practically of no effect, and turn the insane ward over to the care of any person who might interfere in his behalf, without regard to how the guardian looks after or supplies the wants of his ward. In Lincoln v. Buckmaster, supra, the lunatic was not under guardianship. In that case the court said: "This right to supply necessities to lunatics will not justify any one in crediting them with what otherwise might be necessities, so long as they are rightfully under the care and control of family friends, on the ground that they are not properly supported, any more than one can so interfere in the mode of clothing and educating infants while under the care of their natural or legal guardians. All the cases hold this." This reasoning applies with far greater force in a case like the one at bar, where the lunatic is under guardianship, and where the guardian is seeking to learn the wants of his ward, and is ready and willing to supply them. The case shows no occasion for the interference of a stranger. Burns was a "feeble, insane old man" during the entire time covered by plaintiff's account. The court below failed to find that Burns was in want, or that any necessity existed which made any of the items charged necessities at the time they accrued. There is nothing which tends to show that any of the items fall within the class denominated "necessaries," or that any of them, excepting Nos. 5, 6, and 7, were in any way, directly or indirectly, beneficial to Burns, or to show for what purpose the plaintiff expended time and incurred car fare and hotel bills. The plaintiff must have known Burns' mental condition. He had constructive notice of the appointment of a guardian at the time it was made, and actual knowledge after the first five items of his account accrued, yet he took no measures at any time to consult with the guardian until he presented his account to him for payment. It is to be presumed that the county court found and reported all the facts which the evidence before it warranted it in finding, and it is not for this court, in view of the statute requiring the finding of facts to be in writing and signed by the judges, to assume that the county court found facts not included in such statement, which is like and takes the place of a spe-

cial verdict. This court cannot find or infer facts. Hence I insist that the plaintiff cannot recover on the ground on which the majority of the court put their decision, for the reason that he has failed to show affirmatively that the various items of his account were necessities of which Burns stood in need at the time they were furnished him. It may be said that the money specified in items Nos. 5, 6, and 7 was used in the support of and necessities for Burns, but this does not answer the objection that the plaintiff has failed to prove that Burns was so without means of support at the time the money was furnished as to make it fall within the meaning of the term "necessaries" when it was loaned him. If the plaintiff were entitled to recover for the money expended by Bridget Mangham for necessities, it is incumbent upon him to show the amount so used, and this he has failed to do. But the fact that some of the money was subsequently expended for necessities cannot avail the plaintiff. Infants and persons non compos mentis stand on the same footing as to their liability for necessities, and also as to what constitute necessities, as is shown by the authorities already cited. It is well settled that an infant is not liable in an action at law for money supplied him to purchase necessities, although he actually used the money for that purpose. The reason of this is that the contract arises upon the lending, and the law will not support contracts which are to depend for their validity upon a subsequent contingency. In 5 Bac. Abr. (Bouvier's Ed.) "Inf." 119, the rule is stated thus: "So, if one lends money to an infant, who actually lays it out in necessities, yet this shall not bind the infant, nor subject him to an action: for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessities will not, by matter *ex post facto*, entitle the plaintiff to an action." Schouler, Dom. Rel. 555; Tyler, Inf. p. 114, § 70; Chit. Cont. (10th Am. Ed., by Perkins) 163; 2 Kent, Comm. *235; Ellis v. Ellis, 5 Mod. 368; Darby v. Boucher, 1 Salk. 279; Earle v. Peale, Id. 387; Swift v. Bennett, 10 Cush. 436; Bradley v. Pratt, 23 Vt. 386. This would seem to dispose of any claim of the plaintiff to recover on this theory for the money that was expended by Bridget.

Is the plaintiff entitled on any ground to recover for all or any part of his account? The case shows that the probate court had jurisdiction of the person and property of Burns at the time it adjudged him to be an insane person, and that this adjudication was made on due notice and hearing. The first three items of plaintiff's account, amounting to \$5.50, accrued prior to the adjudication and the appointment of the guardian. As they accrued before the adjudication of insanity, it

was incumbent on the defendant to show that the mental condition of Burns at the time these items accrued was such as to render him incapable of contracting. This he has not done. Indeed, the defendant's counsel practically admit plaintiff's right to recover for these items. Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354, and note.

The plaintiff cannot recover for the remaining items, as they all accrued subsequent to the adjudication of insanity and the appointment of guardian, it not appearing that they were necessities. After inquisition and adjudication of insanity, and the appointment of a guardian to an insane person, all his contracts, except for necessities, are void, while such adjudication and appointment remain in force. Beverley's Case, 4 Coke, 126b, 127a; 5 Bac. Abr. (Bouvier's Ed.) 28; 15 Am. Dec. 368, note to Jackson v. King; Ewell, Lead. Cas. 588; Wait v. Maxwell, 5 Pick. 217; Leona v. Leonard, 14 Pick. 280; Lynch v. Dodge, 130 Mass. 458; Pearl v. McDowell, 3 J. J. Marsh. 658; L'Amoureux v. Crosby, 2 Paige. 422, 22 Am. Dec. 655, and note; 1 Greenl. Ev. (12th Ed.) § 550. The soundness of this proposition is especially apparent when applied to adjudications under the probate system established by statute in this and many other of our states. It should be kept in mind that an inquisition of lunacy in England, and in those states which retain the English system of proceeding in such a case, is very different from the proceedings under the system of probate courts in this and other states. By Rev. Laws, §§ 2436, 2437, provision is made for the appointment of guardians by the probate court to insane persons and spendthrifts. The words "insane person" include every idiot, non compos, lunatic, and distracted person; and the word "spendthrift" includes every person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness, or debauchery. Id. §§ 7, 2435. A spendthrift may be put under guardianship whenever he so spends, wastes, or lessens his estate as to expose himself or his family to want or suffering, or the town to charge for supporting himself and his family. Id. § 2437. By statute, guardians of these several classes of unfortunate persons, and of minors, have practically the same rights, and are subject to the same liabilities and duties. There can be no question but what the purpose of the statutes providing for the appointment of a guardian over any person falling within the classes named is "to secure proper care of his person and of his property, and, as to his property, to secure it from being wasted through lack of care or squandered by improvident contracts." Robinson's Ex'r v. Robinson, 39 Vt. 270. To render this beneficent design of the law effectual, it would seem that there can be no doubt but what the legislature intended all contracts, except for necessities, to be void, when made by any person falling within either of the classes named, after he has been adjudged an insane

person or to be a spendthrift, and a guardian appointed over him by the probate court, while such appointment remains in force. This intent is clearly shown by the very full provision for the termination of such guardianship at the instance of the guardian or the ward, provided for by Rev. Laws, §§ 2502-2510, inclusive. If this was not the purpose of our statute on this subject, for what purpose was it enacted? *Motley v. Head*, 43 Vt. 633, is cited in the opinion of the majority of the court as holding that an adjudication of insanity relied upon in defense, to be available, must be accompanied with evidence showing that the insanity is of that character which disqualifies the defendant from making a valid contract, and it does in effect so hold. This case seems to be anomalous. There is a line of cases in England and in America, in states following the English procedure in making inquisition of lunacy, which hold that such inquisition and office found is only prima facie evidence of the incapacity of the defendant to make a valid contract. Most of these cases relate to contracts entered into before office found, but within a time during which the inquisition finds the person to have been a lunatic. I have found no case which did not hold that the finding was prima facie evidence of the defendant's lack of mental capacity to make a valid contract. None of these cases arose under a probate system like our own. In *Motley v. Head*, the court do not even give the adjudication the effect of prima facie evidence; otherwise the burden of proving mental capacity would be cast upon the plaintiff, and not upon the defendant, as stated in that case. In that case a guardian was appointed over the defendant by a court in Massachusetts while he was temporarily there for treatment in an inebriate asylum. At the time of the adjudication and appointment of guardian in Massachusetts, Head was a citizen of this state having his domicile and home, and that of his wife and family, here, and it was stated in the application for the appointment of a guardian that he was a resident of Windsor, in this state. Motley sought to recover for services and money which he rendered and furnished in this state in and about the business of the defendant, by the procurement of Head's wife, who was his agent for that purpose, during the time he was in Massachusetts. The case does not show that Head had any property in Massachusetts, or that by the statutes of that state the probate court there had jurisdiction to appoint a guardian in such a case. It might well be questioned whether, on the facts disclosed, the adjudication of that probate court would have any effect anywhere. If this decision is sound law, it practically prevents or destroys the beneficial results intended by such an appointment over persons of the classes named. Suppose a guardian is appointed over a spendthrift, who is adjudged to be such by reason of excessive drinking, and the ward falls into the hands of some knave,

who overreaches him by a sharp bargain, and then sues him to recover damages for his failure to fulfill it. Under the doctrine laid down in *Motley v. Head*, in order to have the adjudication and appointment of a guardian afford him any protection, the ward must show affirmatively that at the time of the alleged contract his mental condition, resulting from excessive drinking, was such as to render him legally incompetent to enter into a valid contract. *Leonard v. Leonard*, supra, was an action to recover the amount of a promissory note dated May 12, 1830, made by defendant and payable to plaintiff or order. June 1, 1830, the plaintiff was regularly put under guardianship by the probate court as a person non compos mentis. In May, 1831, the defendant paid the plaintiff the amount of the note, and took it up, the same being then in the possession of plaintiff. The defendant offered to prove that the plaintiff was not non compos mentis, but that he was before and at the time the guardian was appointed, and since had been, of sound mind, and capable of managing his own concerns. This evidence was rejected, the court holding that the decree of the court of probate was conclusive, and instructed the jury that under these circumstances the delivery of the money to the ward did not amount to a payment of the note. A verdict was found for the plaintiff, and judgment was affirmed by the supreme court. In delivering its opinion, the court, on the question that the adjudication of the probate court is conclusive, say: "If this were not the general principle of the law, the situation of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust. In every action he might be obliged to go before the jury upon the question of sanity, and one jury might find one way, and another another. We are of the opinion that as to most subjects the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward, but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian cannot do for him. But the transaction now in question falls within the general rule." This exception in regard to a ward's making a will is recognized in *Robinson's Ex'r v. Robinson*, 39 Vt. 270, and is there put upon the ground that "a person of a lower degree of mental capacity is to be regarded competent to make a testamentary disposition of his property than is required to deal with and dispose of it by contracts." *Blaisdell v. Holmes*, 48 Vt. 492, is also cited in the majority opinion. That was an action to recover for services rendered by plaintiff to defendant as his housekeeper. The defendant was a farmer, an unmarried man, owning a farm on which he lived, and which he carried on during the time covered by plaintiff's service. Prior to plaintiff's employment by him, the defendant had been adjudged an in-

sane person, and a guardian appointed over him by the probate court, and during the entire time she worked for him he was under such guardianship. During that time the defendant managed his farm and property and household affairs in his own way, without interference on the part of his guardian. The guardian knew that plaintiff was at work for defendant, and told her to stay and he would see her paid. The plaintiff kept house for defendant, did his cooking, and, so far as appears, performed the usual household duties connected with housekeeping. Her term of service extended one year from November, 1876. The guardian died June 11, 1873, and prior to the bringing of her suit, and after his death, the defendant had no guardian. It would seem from the facts stated that the judgment in favor of the plaintiff, on reason and authority, might have been, and should have been, put on the ground that plaintiff's services were necessities furnished under such circumstances as to make defendant liable therefor. The court seem to have decided the case on the ground that practically there was a termination of the guardianship. In delivering the opinion of the court, Redfield, J., says: "The adjudication of the probate court, that defendant was at the time a proper subject of guardianship, is, no doubt, conclusive; and that condition of the ward is, ordinarily, presumed to continue. But when it affirmatively appears that the ward has recovered from his infirmity, and is in the possession of a sound mind, and is conducting business in his own right and name, like other citizens, and the guardian sees him buy and sell, hire and pay, without notice or inter-

ference, we see no good reason or rule of law that should shield him, more than other men, from the common liability to pay his hired help. Judge Redfield says (3 Redf. Wills, 458): 'In cases of persons of unsound mind, the guardianship will, practically, terminate with the recovery by the ward of his sound mind and disposing capacity.' " If the decision in that case was put upon tenable ground, it is far from being an authority which supports the decision arrived at by the majority of the court, as the facts in that case bear no resemblance to those in the case at bar. In 3 Redf. Wills, 458, and immediately following the quotation made by the court as above, it is said: "But it is regarded, in practice, as the only regular course for the court, on application by any party interested, and notice to all others in interest, to declare the guardianship terminated by the occasion for its continuance having ceased. The same rules will apply to cases of guardianship over spendthrifts." These suggestions are peculiarly pertinent, in view of our statute above cited, providing for the termination of such guardianship. I am aware that this whole subject is attended with difficulty, and that the decisions bearing upon it are somewhat conflicting; but in view of the beneficial results intended by the law providing for guardians over this class of persons, and having in mind its ample provisions for the termination of such guardianship, I think that this court has adopted a view of the matter in the two cases cited and in the case at bar which practically nullifies the law. I would reverse the judgment, and render judgment for the plaintiff to recover \$5.50 damages.

In re RENZ.

(44 N. W. 598, 79 Mich. 216.)

Supreme Court of Michigan. Jan. 17, 1890.

Appeal from circuit court, Wayne county; CORNELIUS J. REILLY, Judge.

Jas. J. Speed, for appellant. *John G. Hawley*, for appellee.

GRANT, J. This is an appeal from the allowance to Jacob C. Mann, guardian of Emma Renz, an incompetent, of the sum of \$485.41 for the care and maintenance of said incompetent at the asylum for the insane at Kalamazoo. The stipulated facts are these, viz.: Emma Renz was the wife of Henry Renz, and had been for some time prior to 1875. In March, 1875, she became insane, and her friends deemed it advisable to remove her to the asylum. She had no guardian at that time, nor until May, 1877. Her husband and John Baumeister on March 4, 1875, made a contract with said asylum to pay certain extra charges and expenses while at the asylum. Her husband was unable to pay such expenses. Mrs. Baumeister, the mother of Emma by a former husband, asked her husband, Mr. Baumeister, to advance the money necessary to send and keep Emma in the asylum, saying to him that she had made a will bequeathing Emma \$1,000, and that he could be reimbursed out of that legacy. Baumeister expecting to be reimbursed, paid the above amount for removing and keeping her at the asylum. Mrs. Baumeister died May 24, 1876, leaving a will containing the bequest, and making her husband executor. After the legacy became payable, Jacob Mann was appointed guardian, and filed his account as such guardian in the probate court, charging himself with \$1,000, the amount of the legacy, and crediting himself with the above amount, which Baumeister had expended for the care of Emma at the asylum. The circuit court held that this amount was properly chargeable by Baumeister against the legacy, and that it was proper and lawful for said Mann, as guardian, to allow the same.

That the removal of Mrs. Renz to the asylum was dictated alike by necessity and humanity; that Baumeister and Mann, the guardian, acted in good faith; that the expenditure of the money was judicious, and for her benefit,—are not questioned. But it is contended on the part of the appellants that the claim of Baumeister is ille-

gal, because the husband was primarily liable, and Mrs. Renz, being insane, could neither contract nor assent to this transaction, and did not. But her husband was unable to pay, and she had only an expectancy from her mother. If appellant's position be correct, then an insane married woman, whose husband is unable to provide for her proper medical treatment for her malady, though possessed of an estate *in present* or expectancy, must either become a public charge, or be left without assistance. In *Carstens v. Hanselman*, 61 Mich. 430, 28 N. W. Rep. 159, the court says: "where a husband utterly deserts his wife, it would be a cruel rule for her if she cannot, in his absence at least, or in his presence, if he does not himself provide for her, make a binding agreement for any necessary, whether articles to be purchased or professional help, without becoming a public charge." Still more cruel would be a rule that the friends of an insane married woman cannot advance money to procure for her medical attendance and care when the husband is utterly unable to do so, and in so doing bind her estate. Infants and insane persons are liable for necessities furnished them, and the statute of this state expressly makes the estates of insane persons liable for their maintenance at the asylum. Act No. 135, § 32, Laws 1885. *Alexander v. Miller*, 16 Pa. St. 219, cited by appellant, is not in point. In that case the wife of an insane man attempted to sell his property, not to provide medical care or necessities, but to prevent the levy of an execution on his property. Of course she had no authority to do this. The question presented here did not arise in that case. The husband of Mrs. Renz being unable to provide for her removal to the asylum, an act of the highest necessity, it would have been competent to use her own property for that purpose, if she had been possessed of any. Baumeister advanced the money, not as a gift, but expecting eventually to be reimbursed. A guardian was subsequently appointed, and received a thousand dollars, the property of Mrs. Renz. If a guardian had been appointed before she was sent to the asylum, and he had sent her there, and paid for it, would it be contended that he had no right to be reimbursed out of her estate? Under the circumstances, we hold that the claim was an equitable one, and was properly allowed by the probate court. The judgment must be affirmed, with costs. The other justices concurred.

ALEXANDER v. HASKINS et al.

(25 N. W. 935, 68 Iowa, 73.)

Supreme Court of Iowa. Dec. 17, 1885.

Appeal from district court, Harrison county.

Action to set aside a conveyance of real estate made by the plaintiff, on the ground that he was insane. The relief asked was denied, and the plaintiff appeals.

J. H. Smith and A. W. Clyde, for appellants.
H. H. Rondifer and S. H. Cochran, for appellees.

SEEVERS, J. The general rule is that an insane person is not bound by contracts (*Van Patton v. Beals*, 46 Iowa, 62), and it has been held that it is immaterial whether the defendant had knowledge of such insanity when the contract was entered into (*Seaver v. Phelps*, 11 Pick, 304). While the foregoing may be regarded as the general rule where an application is made to set aside the contract by some one acting for the insane person, there are exceptions thereto when the contract has been executed; and in this state the rule is that an insane person is bound by such contract "where it is made in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put in statu quo." *Behrens v. McKenzie*, 23 Iowa, 333; *Ashcraft v. De Armend*, 44 Iowa, 234; *Abbott v. Creal*, 56 Iowa, 176, 9 N. W. 115.

We have carefully examined the evidence, and unite in the conclusion that the plaintiff was insane at the time the contract and conveyance in question were made. But counsel for the appellees insist that the conveyance cannot be set aside because it was made in the usual course of business, and is in all respects fair and reasonable, and therefore the case is brought within the rule established in the foregoing cases. From a careful consideration of the evidence, we reach the conclusion that in this counsel are mistaken. It is averred in the petition that the defendants had knowledge of the mental condition of the plaintiff at the time the contract and

conveyance were made, and we are satisfied that this has been established by the evidence. We deem it unnecessary, and such is not our custom, to set out the evidence and state our reasons at length.

There is therefore a material distinction between the cases above cited and this. Our attention has not been called to any case which holds that a contract made with an insane person, with knowledge of the insanity, has been sustained, and we think none such can be found. Besides this, we are not satisfied that the contract and conveyance in question is fair and reasonable. The evidence shows that the land was worth, at the time the conveyance was made, from \$500 to \$800. We will assume that it was worth at least \$600. The defendant paid the plaintiff possibly \$95, and there is evidence tending to show that the defendant claimed the plaintiff was indebted to him on an account, including the \$95 above stated, in the amount of about \$200, but the correctness of this account has not been established. It therefore must be disregarded. There was a mortgage on the land executed by the plaintiff for \$300, and it will be conceded that, as between these parties, the defendant agreed to pay it, but the plaintiff was not released from personal liability thereon. There is no evidence tending to show that this mortgage has been paid. If it be conceded that the indebtedness due by the plaintiff to the defendant was regarded as satisfied by the conveyance, and that its correctness has been established by the evidence, it only amounts to \$214.99, or about one-third of the value of the real estate. The defendants have had possession of the land, and have received the rents and profits thereof, for four years; and the evidence shows that the rental value thereof has been at least \$60 per year, or say \$250 for the whole period. It therefore clearly appears that the defendants have received, in rents and profits, more than they paid the plaintiff for the lands. We are of opinion that the court erred in refusing to set aside the conveyance, and there will be a decree entered in this court, if counsel so desire. Reversed.

BLACKSTONE v. STANDARD LIFE & ACC. INS. CO.¹

(42 N. W. 156, 74 Mich. 592.)

Supreme Court of Michigan. April 24, 1889.

Error to circuit court, Lenawee county; LANE, Judge.

Action by Emma W. Blackstone against the Standard Life & Accident Insurance Company. Judgment was given for plaintiff, and defendant brings error.

James T. Keena, (C. E. Weaver and Atkinson, Carpenter & Brooke, of counsel,) for appellant. *Westerman & Westerman, (Seth L. Bean and Levi T. Griffin, of counsel,)* for respondent.

LONG, J. Plaintiff brought her action upon a policy of insurance, the material parts relating to this case reading as follows:

"In consideration of the representations made in the application for this insurance and the sum of twenty-five dollars, this company hereby insures Daniel L. Blackstone, Esq., residing at Adrian, county of Lenawee, and state of Michigan, hereinafter styled the insured, by occupation, profession, or employment a traveling salesman, in the principal sum of five thousand dollars for the term of twelve months, commencing at 12 o'clock noon on the 27th day of February, 1886, the said sum to be paid to Mrs. Emma W. Blackstone, his wife, if surviving, within thirty days after the receipt of satisfactory proofs that the said insured shall have sustained during the continuance of this policy bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof: * * * provided, always, that this policy is issued and accepted subject to all the provisions and conditions herein contained and referred to. The statements and declarations of the insured, in his application for this insurance, together with the company's classification of hazard, is referred to and made a part of this contract; and if this policy, or any renewal thereof, has been made or shall be obtained through misrepresentations, fraud, or concealment, or if any attempt shall be made by false swearing or suppression of any material fact on the part of the insured or beneficiary, to obtain any sum under this policy or any renewal thereof, then the same shall be absolutely void; provided, always, that this insurance shall not extend to hernia; nor to any bodily injury of which there shall be no external or visible sign; nor to any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease, or by poison in any manner or form, or by any surgical operation or medical or mechanical treatment; nor to any case except

where the injury is the proximate and sole cause of the disability or death. And no claim shall be made under this policy when the death or injury has been caused by dueling, fighting, wrestling, unnecessary lifting, or by overexertion, or by suicide, or by sunstroke, freezing, or intentional injuries inflicted by or through the connivance of the insured, or when the death or injury may have happened in consequence of war. * * * And this insurance shall not be held to extend to disappearances, nor to any cause of death or disability, unless the claimant under this policy shall establish by direct and positive proof that the said death or disability was caused by external, violent, and accidental means."

This policy was made subject to certain conditions, the second of which is: "The insured is required to use due diligence for personal safety and protection. In the event of any accidental injury for which claim may be made under this policy, immediate notice shall be given in writing, addressed to the company at Detroit, Michigan, stating the full name, occupation, and address of the insured, with full particulars of the accident and injury; and failure to give such immediate notice shall invalidate all claims under this policy, and unless direct and affirmative proof of the death of the insured shall be furnished to the company within ninety days from the happening of such fatal accident, or within six months in the case of non-fatal injury, then all claims accruing under this policy shall be waived, and forfeited to the company." The policy was issued upon a written application signed by the insured. The twelfth, thirteenth, and fourteenth clauses of the application are as follows: "(12) My habits of life are correct and temperate, and I understand the policy will not cover any accident or injury resulting from the use of intoxicating drinks, or in consequence of having been under the influence thereof, or a breach of the law, or to any injury which may result from disease or prior injury. I am aware and agree that the benefits from the company will not extend to hernia, orchitis, overexertion, or strains, nor to any bodily injury which has not been effected through external and accidental violence, or of which there shall be no external and visible signs, or by poison in any form or manner, or by any surgical operation or medical or mechanical treatment, nor to any cause except where the accidental injury shall be the proximate and sole cause of the disability or death. (13) I am not suffering from any accident or wounds that would retard recovery, or be aggravated by personal injury. I am not subject to fits, or to any disorders of the brain or nervous system, or any physical infirmity which would render me liable to accident. (14) I hereby agree that the application and declaration shall be the basis of the contract; that the policy will be accepted subject to all the conditions and provisions contained therein; that any con-

¹ Opinion of Campbell, J., omitted.

concealment of material facts, or misstatements made by me, shall work a forfeiture of all claims that may accrue under this policy."

The declaration filed in the case, after stating the issuing and the conditions of the policy, avers "that on the 28th day of October, A. D. 1886, her said husband died from bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of said policy contract, and the conditions therein set forth; and that said injuries alone occasioned his death, and within ninety days from the happening of said injuries." The defendant pleaded the general issue, and gave notice that the policy declared upon was obtained by the insured upon an application,—the material portions of which have been heretofore set out,—and under an agreement that said application should be the basis of the contract. That, at the time when said application was made, the insured was subject to disorders of the brain and nervous system, and to physical infirmities which rendered him liable to accident; and the fact that he was so subject was concealed by him from the defendant. That the insured died from injuries resulting from disease. That the insured, before the time he made said application, had been for a long period insane, and at the time of making said application concealed that fact from the defendant. On the trial in the court below the plaintiff had verdict and judgment for the amount of the policy and interest. Defendant brings error.

It appeared upon the trial in the court below that the insured, Daniel L. Blackstone, was a traveling salesman, and was employed in that capacity during the spring and summer of 1886 by the Acme Hay Harvester Company, of Peoria, Ill. About September 1, 1886, he was thrown out of employment, and returned to his home in Adrian, and remained there until October 18th, when by correspondence he secured a situation with Mast, Buford & Burwell Manufacturing Company, of St. Paul, Minn. He left his home in Adrian October 18th, for the purpose of filling this engagement, and arrived in St. Paul on the 19th, and remained there until the 27th of that month, when he put an end to his life by cutting his throat with a razor. It is claimed by plaintiff that during the last two or three weeks of his remaining at home he showed evidence of mental derangement, and that during his stay in St. Paul, from October 19th to the 27th, there was evidence of insanity. The plaintiff's claim of recovery on the policy rests upon two propositions, each of which is denied by the defendant: (1) That Blackstone was insane at the time he took his life: (2) that an insane self-killing is an accident within the meaning of this policy. Was Blackstone insane at the time he took his life? At the close of the testimony the counsel submitted five special questions to the jury for their finding, as follows: (1) Did Mr. Blackstone kill himself? (2) Did he know at the time

that he was committing an act which must result in death? (3) Was he conscious of what he was doing? (4) Did he intend to cut his throat, and thereby kill himself? (5) At the time Daniel L. Blackstone cut his throat, was he insane? The jury answered these questions, the first and fifth in the affirmative, and the second, third, and fourth in the negative. We, have, therefore, presented to us by the record of the fifth finding of the jury that the insured was insane at the time he cut his throat, and the only inquiry for us upon this part of the case is, Was there any evidence to support this finding?

It was said by this court in *Coney v. McDonald*, 40 Mich. 158: "We are bound in all cases to assume that the jury have done no legal wrong when acting within their province. * * * The credibility of witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. * * * To take from them this right is but usurping a power not given." This doctrine has always been adhered to in this state, and has been stated and restated in so many cases in this court that no reference to them is necessary. The testimony relating to the insanity of Mr. Blackstone is somewhat voluminous, and we shall quote only portions of it.

Mr. Wallace Westernman was called as a witness by the plaintiff, and testified substantially that he had known Mr. Blackstone between 12 and 13 years; that he was a man of more than ordinary intelligence,—a man well read, courteous, and of more than ordinarily pleasant and genial disposition. His business for 10 years prior to his death was that of a traveling salesman engaged with different houses. For four or five years he was with Comstock Bros., of Adrian; then for Fairbanks, Morse & Co., up to April, 1886; and then for the Acme Hay Harvester Company of Peoria, up to September 1, 1886, when he returned home. His family relations were of the most pleasant character. He had a wife, and a family consisting of two girls and one boy. That from the time of his return home—the 1st of September—till his going away on October 18, 1886, witness was in his house every day. At the first of his being home at this time he saw no special difference in his conduct, but after he had been home two or three weeks he discovered a marked change in his conduct. These characteristics came on by degrees. He appeared to be depressed; and the nearer the time came for him to leave home this despondent, indifferent sort of disposition seemed to grow upon him. He complained that he did not sleep well, and put his hand up to his head; frequently found him walking the floor, and sometimes sitting in a chair in a sort of stupid condition, paying no special attention to those around him; complained of pain in the head, and his face had a bloated appearance. He fell away in flesh, and appeared to be haggard, and, as these spells would pass off, would look pale and sickly. The witness, upon a direct ques-

tion, said: "I was of the opinion he was insane. I did not object to his going away, because I did not think the man's mind was so far gone but that when he got away from home he would recover from it; that if he could get away from home he would brace up and recover from it. The deceased was my father-in-law."

Mrs. Westerman, the wife of the last witness, and a daughter of the deceased, testified that her father's domestic relations were pleasant. That she saw him every day for the three weeks before his going to St. Paul, and noticed a marked change in his condition. He complained of his head and stomach. He did not take much notice of his grandchildren, when before that he always loved to have them around him; but at that time their noise seemed to worry him. He would not go out at all, and did not seem to want to see any one.

Mr. Henry Armstrong, a resident of Adrian, saw the deceased frequently, and noticed a change in him just before his going away, as he passed him on the street. The change was so great that he hardly recognized him.

Walter Westerman testified that he had known him for years; that he was always in the habit of shaking hands with every one, and made many friends; was pleasant, social, and agreeable in his manners; a man who was very bright, of more than ordinary education, and always ready to make a speech wherever called upon. Witness is a partner with the witness Wallace Westerman, in the law business, and deceased was frequently in their office, but for the three weeks before deceased's going away in October he but seldom came to the office. Just prior to his going away to St. Paul he came into the office, and came up within a few feet of Westerman, who got up and offered to shake hands, but Blackstone apparently did not see him make the offer, and did not shake hands, but stood with his head down, and finally said, "Where is Wallace? Tell him I want that key;" and, turning around, went partly to the door, turned again into the room a few feet, and finally went, slamming the door after him.

The plaintiff says that before his going away on October 18th she noticed a change in his mental condition. He was uneasy and nervous, complained of his head, and had a desire to be alone. He appeared bad, his face was flushed and bloated, he did not sleep much, manifested restlessness by walking in the house and out in the back yard. Went down town but little. "We could divert his mind so that he would be social for a few minutes, but just as soon as we stopped talking with him his mind was absorbed in something. We did not know what he was thinking about. He was affected in his mind. We let him go away because we thought with employment, and being out of doors, he would be better."

Depositions were taken at St. Paul and read

on the trial. J. Summers testified he kept the Windsor Hotel, and that Blackstone stopped there from October 20th to the 25th; that on that day one of the servants informed him that a man up stairs had cut his throat. He went up stairs, found Blackstone in his room, lying on the floor, between the washstand and the foot of the bed, in a crouched-up position. He was quite rigid. His throat was cut from ear to ear, apparently by the razor that was lying, where he had fallen, covered with blood, across the room. On a little bureau lay an open satchel and the razor case. He had apparently been dead several hours. On the day previous to his death he was in the office the most of the forenoon. Never saw him in conversation with others about the hotel.

Mr. J. H. Baker, of St. Paul, testified that his business was that of keeping a restaurant. He met Blackstone a few days previous to his death. He was in very poor health, and said he was under treatment from Dr. McCoy for stomach trouble. He looked pale and haggard, restless, and in a very unpleasant state of mind. He would sit down for a minute, and then would get up and walk around, and talk about his trouble, his ill health, and he appeared to be slightly confused.

J. P. Warner testified that he was connected with Mast, Buford & Burwell, of St. Paul. "On October 20, 1885, he was employed by our firm. He was to prepare himself a few days before starting out on the road,—was to start out Wednesday morning the week after he came, and had his satchel all packed, and left the office about 5 o'clock Tuesday afternoon. He was to take the 8 o'clock train Wednesday morning. His valise was left at our office, and I was in doubt what had become of the man. On Thursday afternoon I learned he had killed himself. *Question.* Now, during the time you saw him, did you in your conversation with him detect in it any peculiarities of mental condition as evidence of what he said or did? *Answer.* Yes. The second morning he was with us he came in in a hurried and peculiar manner, and rushed up to the counter to me, inquiring for mail in a very impatient manner, so much so that I was about to say something to him, and looked at him pretty sharp. The duties he was required to perform on the road required some study and posting. He would be getting information about one particular thing, and would turn off another minute, and be in some other place in the office looking at some book, and a few minutes afterwards would be out of doors, and at one time he went off on the railroad track when Mr. Burwell was not down, standing around at the Manitoba depot. He did not pay close attention to his duties. He acted strange in that he would not take time to listen as a person ought. He would shoot off when being talked to. He acted as if he wasn't listening, and had that indifferent way." Witness then says: "I am satisfied from his pe-

culiar actions that I saw, and his subsequent actions, that he wasn't in his right mind; and outside of the fact that he committed suicide I would say I would consider him unbalanced in his mind."

Mr. J. M. Bigford testified that he was a salesman for Mast, Buford & Burwell at St. Paul; that he met Mr. Blackstone first in October, at their office. It was his duty to post him on prices of goods of which he was to make sales. He spent a part of each day with him. One day, while showing him a new model plow, it was almost impossible to get him interested in it. He asked no questions, and did not give the least indication that he understood it. He seemed to be in a deep study, and his mind wandering off from the subject being talked about. He asked to be excused; said he wanted to go up-stairs; did not go, but went into the office, and took off his overcoat, and paid no more attention to the business. "I remarked," said the witness, "to Mr. Warner that I didn't think he was right. I was of the opinion that he was not in his right mind. What I told him seemed to make no impression on his mind. I would go over the same ground again, and still he appeared as ignorant as he did before. I believed him to be a man of unsound mind."

Mr. H. A. Estes was clerk of the Windsor Hotel, and noticed that the deceased did not take his meals regularly, appeared to be despondent, made no acquaintances about the house. He complained of not feeling well.

Dr. James A. Quinn testified that he was a physician at St. Paul, and saw the deceased after his death; made an examination; and says that the wound in the throat was the cause of death, and was one which could have been made by the deceased with his own hand.

This is substantially all the testimony bearing on the question of the insanity of the insured, except some circumstances related by Mr. Wallace Westerman and Walter Westerman relative to some peculiarities in the conduct and bearing of the insured just prior to his going to St. Paul. Mr. Blackstone wrote home to his wife from St. Paul on the 19th, and again on the 20th and 23d, and in his last letter acknowledged receipt of letters from home. These letters are concise, speaking of his business arrangements, and making inquiry about the health of the family. In the letter of the 20th he speaks of the pain in his head and stomach, and says he thinks it was the jar of the cars, and hopes it will not affect him so badly when he comes to travel again. In this letter he also speaks of seeing in the papers an account of a number of persons in Adrian being poisoned by drinking cider in which arsenic was put, and inquired of his wife who they were. In the letter of the 23d he says: "I am tired out. I am very sorry to pain you by writing this, but you asked me to tell you how I feel. It seems to me if I could have some work out of doors, like riding, and something to employ my mind, I might

gain. I shall do the very best in that direction. Pray for me, and do not blame me for what may seem inconsistent to you." We think there was some evidence to go to the jury upon the question of insanity. It is not of great weight, but that is not a question which we are at liberty to discuss; and while we might have found differently from the jury if we were to consider it as a question of fact for our determination, yet, there being some evidence of the fact, and the jury having determined it under what we think a fair submission of it by the court to them, we are not called upon to disturb it.

The insured was a man 55 years of age, of genial and pleasant disposition, full of life and vigor up to within a few weeks of his death; a man of good education, and good mind; talkative, and apparently happy. His domestic relations were pleasant, and, so far as this record discloses, no great amount of care was placed upon him in their support and maintenance. One of the daughters was married to a man apparently prosperous in business, and the insured had no debts of any amount, and no creditors pressing him for payment. Up to within a month or six weeks of his going to St. Paul he had been constantly employed at good wages, and no one dependent upon him was suffering during that time from his enforced idleness. He became moody, restless, and nervous before leaving home. He could not sleep nights, walked the floor, and was found at times pacing the back yard. His condition became noticeable to his wife and the family. He was abstracted, and at times failed to respond to the salutations of his acquaintances. His mind seemed to be troubled; complained of pain in the head, and looked haggard and sick. On his arrival at St. Paul, where he was among strangers, his appearance caused remarks. He could not get to the business he went to take charge of,—could not keep his mind upon it; was nervous and restless, wandering from place to place, and changeable in his conduct; nervous, and keeping aloof from other men by whom he was surrounded; complained of pain in his head and stomach; writing home to his wife to pray for him, and not to blame him if he did anything inconsistent; and finally, on the 27th of the month, is found with his throat cut from ear to ear by a razor,—the act being committed by his own hand.

Every person is presumed sane, and the burden is upon the plaintiff in the case to show the insured insane at the time of the taking of his life. The jury must determine this question from the acts and conduct of the deceased, and this can only be gathered from witnesses who are cognizant of the facts. The learned counsel for the defendant, however, argues that, even if there was evidence to go to the jury on the question of insanity, and though the jury have found that the insured came to his death while insane, yet, it appearing that he came to his death by his own hand, it is not a bod-

ily injury, effected through external, violent, and accidental means, within the meaning of the policy. Practically, all the cases agree in holding in the language of the supreme court of Massachusetts in *Cooper v. Insurance Co.*, 102 Mass. 227, that there is no substantial difference of signification between the phrases, "shall die by his own hand," "shall commit suicide," and "shall die by suicide." The rule of construction, though not always recognized by the cases, is that this condition, being in the nature of a penalty or forfeiture, must be strictly construed. In *Insurance Co. v. Moore*, 34 Mich. 41, Mr. Justice CAMPBELL, speaking for the court, said: "The condition which makes the policy void in case of such a death is in the nature of a penalty or forfeiture. * * * The forfeiture in this case was to arise if the insured died by his own hand. Some stress is laid on the term 'suicide,' as if it means a wrongful act, or self-murder. It has no such restricted meaning. It means self-killing, just as 'homicide' means killing any one else. But there may be excusable homicide as well as felonious; and suicide was only cognizable at law when the person was *felo de se*, or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense the man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will."

Upon the question of voluntary suicide, intentionally committed by a sane man in the possession of his faculties, knowing how to adopt means to ends, and conscious of the immorality of the act, there is no difference of opinion; and all authorities agree that self-destruction is within the exemption; and all authorities likewise agree that an accidental death,—as by taking poison by mistake, or shooting one's self with a pistol, supposing it not to be loaded, or falling from a building, or death happening in any way by the unintended act of the party dying,—is not within the exemption. But whether suicide by an insane man is also within the exemption has been the question in dispute, and upon this two prominent and different doctrines have been maintained. On the one hand it is maintained that if the act be voluntarily done in pursuance of an intelligent purpose, and intentionally and intelligently carried out by the proper adoption of means to ends, it is suicide on the part of the insured, or death by his own hands, although insanity exists to such an extent that he may not be able to appreciate the moral qualities of the act. On the other hand it is maintained that, however intelligently the act may be done, if at the time the will be overpowered by an uncontrollable impulse, or the party be unable to appreciate the moral character of the act, it is not within the meaning of the provision. *May, Ins.* § 307. The rule in England was laid down in 1843, in *Bor-*

radale v. Hunter, 5 Man. & G. 633, and has since been adhered to. In this case the words of the condition were that the policy should be void if the assured should "die by his own hand." He threw himself from Vauxhall bridge into the Thames, and was drowned. The jury found that he voluntarily threw himself into the river, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was held that the policy was void, the rule being laid down, in effect, that the moral condition of the mind was immaterial; and if, when the act was done, the insured knew that life would be thereby destroyed, and intended it to be so, the policy is violated under the condition, although the insured was insane at the time. In *Dean v. Insurance Co.*, 4 Allen, 96, the supreme court of Massachusetts held substantially the doctrine as laid down in *Borradale v. Hunter*, supra. In *Insurance Co. v. Graves*, 6 Bush, 268, the supreme court of Kentucky were divided upon the question of the soundness of *Borradale v. Hunter*, but unanimously agreed that where the suicide was committed during an uncontrollable passion, caused by intoxication, the condition was broken, and the policy avoided. In a more recent case in Massachusetts (*Cooper v. Insurance Co.*, 102 Mass. 227) the question came again before the court, and the ruling in *Dean v. Insurance Co.*, supra, was adhered to. The proviso in the policy is that it shall be void if the assured shall die by suicide. The plaintiff offered to prove that the assured at the time of committing the act of self-destruction was insane. The court said: "In the present case there was no offer to prove madness of delirium, or that the act of self-destruction was not the result of the will and intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act."

The earliest case in New York is that of *Breasted v. Trust Co.*, reported in 4 Hill, 73. The policy was to become void if the assured died by his own hand. The insured came to his death by suicide by drowning himself in the Hudson river. Chief Justice NELSON, delivering the opinion of the court, said, speaking legally: "Self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand, than to the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power; nor is there any greater reason for exempting the company from the risk assumed in the policy than if his death had been occasioned by such means. Suicide involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a

lunatic is not an act of suicide, within the meaning of the law;" and citing 4 Bl. Comm. 189; 1 Hale, P. C. 411, 412. This case was modified, if not overruled, in *Van Zandt v. Insurance Co.*, 55 N. Y. 169, where it was held that, under a condition as above, the only exception to the condition is where the act is accidental or involuntary; that to take a case out of the proviso the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse, which he could not resist. It is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act. In the later cases in New York it is held that the words "die by his own hand" have reference to an intelligent voluntary act, and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary. *De Gogorza v. Insurance Co.*, 65 N. Y. 235; *Weed v. Insurance Co.*, 70 N. Y. 561; *Newton v. Insurance Co.*, 76 N. Y. 426. The supreme court of Maine, in *Eastabrook v. Insurance Co.*, 54 Me. 224, where the condition of the policy was that, if he should "die by his own hand," and the jury found "that the self-destruction was the result of a blind and irresistible impulse over which the will had no control," and that "the self-destruction was not an act of volition," approved *Breasted v. Trust Co.*, supra, holding that suicide, to avoid a policy of life insurance, must be a criminal act,—one done with an evil motive.

The leading case upon the subject is that of *Insurance Co. v. Terry*, 15 Wall. 580, approving what had been known as the "New York doctrine." In this case the policy was to be void if the insured should die by his own hand. Mr. Justice HUNT, after a full review of the cases, laid down the rule, thus: "If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable." This rule has been approved by subsequent cases in that court. *Insurance Co. v. Rodel*, 95 U. S. 237; *Insurance Co. v. Broughton*, 109 U. S. 123, 3 Sup. Ct. Rep. 99; citing and approving the opinion of Chief Justice NELSON in *Breasted v. Trust Co.*, supra. The rule laid down in *Insur-*

ance Co. v. Terry, 15 Wall. 580, is substantially the same doctrine as stated by this court in *Insurance Co. v. Moore*, supra. We think the reasonable rule is as stated by Mr. Justice HUNT in *Insurance Co. v. Terry*, supra. "If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of this act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." This doctrine is approved and followed in express terms, or in substance, in *Insurance Co. v. Rodel*, 95 U. S. 232; *Insurance Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99; *Waters v. Insurance Co.*, 2 Fed. Rep. 892; *Moore v. Insurance Co.*, 3 Ins. Law J., 444, (U. S. C. C. E. D. Michigan); *Merritt v. Insurance Co.*, 55 Ga. 103; *Phillips v. Insurance Co.*, 26 La. Ann. 404; *Insurance Co. v. Moore*, 34 Mich. 41; *Scheffer v. Insurance Co.*, 25 Minn. 534; *Insurance Co. v. Groom*, 86 Pa. St. 92; *Hathaway's Adm'r v. Insurance Co.*, 48 Vt. 335. The same doctrine, in substance, is laid down in *Eastabrook v. Insurance Co.*, 54 Me. 224, approving the principal cases.

The effect of this doctrine is that, in order to work a forfeiture under such a policy on the ground of self-destruction, the assured must have had sufficient mental capacity not only to understand that the act will destroy his life, but also distinguish its moral quality and consequences,—the right and wrong of it; and must perform the act, not under any uncontrolled impulse resulting from insanity, but voluntarily, with the intent to end his life. In other words, that it must be an act done with an evil motive. We think that this doctrine is supported by the great preponderance of authority in this country, and must be conceded to be the prevailing American doctrine; and it seems to us to be the safer and more reasonable and more consistent doctrine. It agrees with the general rule as to the excusatory feature of insanity in civil as well as in criminal cases. It also operates to prevent forfeiture, which is a favorite principle of an enlightened jurisprudence. Nor can it have any injurious effect, since insurers may always frame such contracts to suit themselves, and may, if they choose, insert express stipulation to the effect that insanity shall not in any case prevent an avoidance by the suicide of the assured. As is stated in a note to *Breasted v. Trust Co.*, 59 Amer. Dec. 494: "If they prefer, for the

purpose of getting custom, to omit such stipulations, and to leave the matter in doubt, the doubt ought to be resolved against them. If the assured is to take the sole risk of his becoming insane, and destroying his life, let him have notice of the fact by having it clearly "nominated in the bond." As has been well said in some of the cases referred to, insanity is as much a disease as fever or consumption; and upon principle there is no more reason why an insurance of one's life should not be an insurance against death from the former disease than against death from the latter, if there is nothing to the contrary in the policy." Policies issued by some life insurance companies contain a condition or proviso that it shall be void if the assured shall die by suicide, felonious or otherwise, sane or insane; others provide, if the assured shall die by suicide, sane or insane; others provide for an avoidance, if the assured die by his own hand, sane or insane; while others provide for an avoidance if he shall die by his own act and intention, sane or insane. Such a condition, expressed in any of these forms, covers any case of voluntary self-destruction, and no kind or degree of insanity will prevent an avoidance; and the courts, not only in England, but in this country, have almost universally held that with such provisions in policies of life insurance the policies are void if the insured comes to his death by his own hand. Some of those cases are cited by the learned counsel for the defendant in his brief as having some bearing upon the question now in issue. We think they have no bearing upon the case where no such proviso is found in the policy.

Defendant's counsel seem to rely to some extent upon the ruling of this court in *Street v. Society*, reported in 31 N. W. Rep. 779, as bearing upon the question whether the insured came to his death in this case by accidental injuries. The policy in that case contained a condition, if the assured shall within three years from the date of this policy die by his own hand, sane or insane, this policy shall become and be null and void. Within the three years from the date of the policy the insured died from the effects of a pistol-shot wound inflicted upon himself. The court followed the opinion of Mr. Justice DAVIS in *Bigelow v. Insurance Co.*, 93 U. S. 284, holding that no recovery could be had upon the policy, by reason of the limitation contained in the proviso, "sane or insane." After quoting from the opinion of Mr. Justice DAVIS, it was said: "If a person does an act in a state of unconsciousness, or involuntarily, whether he be sane or insane, such act is nothing more nor less than accidental, and would not operate to forfeit the policy. The record in this case does not disclose such a state of facts. There was no evidence that the act was involuntary, or that Mower was unconscious when he inflicted upon himself the fatal wound. The policy covers all conscious acts of the insured by which death by his own hand is compassed,

whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission."

Counsel for the defendant now insists that if the insured was insane his insanity caused his death, and that insanity is a disease, and that the question remaining, and upon which the court must pass, is, is the death caused by the disease "insanity" an accidental death? The policy provides "that the insurance shall not extend to any bodily injury of which there shall be no external or visible sign, nor to any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease, nor to any one except when the injury is the proximate and sole cause of the disability or death." Is insanity a disease? The learned Dr. Buckham, in his work on *Insanity in its Medico-Legal Relations*, published in 1883, at section 23, says: "We think sufficient evidence has already been adduced to show that insanity is a physical, and not a mental, disease. And yet the proof *par excellence* remains to be offered. We have taken considerable trouble to acquaint ourselves with the facts, and we believe that there is no alienist in the United States who believes that insanity is a disease of the mind." And the learned doctor offers the following as a definition of insanity: "A diseased or disordered condition or malformation of the physical organs, through which the mind receives impressions, or manifests its operations, by which the will and judgment are impaired, and the conduct rendered irrational." And he says: "As a corollary we offer: Insanity being the result of physical disease, it is a matter of fact to be determined by medical experts, and not a matter of law to be decided by legal decisions and maxims." Agreeing, as we do, with the learned doctor, that insanity is a physical disease, and a question of fact for determination in the case, let us see what has been determined by the jury, before considering the proposition made by the counsel for the defendant.

The jury found *First*, that the insured killed himself; *second*, that he did not know at the time that he was committing an act which must result in death; *third*, that he was not conscious of what he was doing; *fourth*, that he did not intend to cut his throat, and thereby kill himself; and, *fifth*, that at the time he did cut his throat he was insane. Admitting that there was some evidence to go to the jury upon those questions, and that those questions have been properly submitted to them by the court upon the trial, then we are asked to say that insanity being a disease, that disease was the proximate cause of the death of the insured, and that he did not come to his death by an external accidental injury, within the meaning of the terms of the policy. In *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. Rep. 685, a policy similar in form and conditions

was issued, based upon an application in substance the same as the one in issue here. Mr. Justice GRAY, delivering the opinion of the court in that case, said: "The single question to be decided, therefore, is whether a policy of insurance against 'bodily injuries effected through external, accidental, and violent means,' and occasioning death, or complete disability to do business, and providing that 'this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries,' covers a death by hanging one's self while insane. The decisions upon the effect of a policy of life insurance which provides that it shall be void if the assured 'shall die by suicide,' or 'shall die by his own hand,' go far towards determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words 'sane or insane,' does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect;" citing *Insurance Co. v. Terry*, 15 Wall. 580, and other cases in that court since that time. "In this state of the law there can be no doubt," says Justice GRAY, "that the assured did not die 'by suicide,' within the meaning of this policy; and the same reasons are conclusive against holding that he died by 'self-inflicted injuries.' If 'self-killing,' 'suicide,' 'dying by his own hand,' cannot be predicated of an insane person, no more can 'self-inflicted injuries,' for in either case it is not his act. Nor does the case come within the clause which provides that the insurance shall not extend to 'death or disability which may have been caused wholly or in part by bodily infirmities or disease.' If insanity could be considered as coming within this clause it would be doubtful, to say the least, whether under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death. * * * The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy by which he is declared to be insured 'against bodily injuries effected through external, accidental, and violent means.' This sentence does not, like the proviso, speak of what the injury is 'caused by,' but it looks only to the 'means' by which it is effected. No one doubts that hanging is a violent means of death, as it

affects the body from without. It is external, just as suffocation by drowning was held to be in the cases of *Trew*, *Reynolds*, and *Winspear*,¹ above cited. And according to the decisions as to suicide under policies of life insurance before referred to, it cannot when done by an insane person be held to be other than accidental."

Counsel for defendant, considering this case of *Insurance Co. v. Crandal*, says, "that while the court held that insane self-destruction was an accidental death, and seemed to be of the opinion that insanity was a disease, there was no discussion by the court of the question whether insanity, being a disease, would not preclude insane self-destruction being an accidental death; that the court avoided the discussion of this question by suggesting that though they did not decide that, in accordance with the authorities already discussed, insanity was not the proximate cause of the death, and decided that the policy did not exempt the insurer from liability for a death of that character; that this was an evasion of the question squarely presented to the court for their consideration; that, regardless of the exceptions in the policy, the company was clearly not liable, unless the death was accidental; and in deciding the case the court was bound to say either that death was not caused by the disease insanity, or that death so caused is accidental death." We think that the court in that case held that, while insanity was a disease, yet the insured, having come to his death by hanging, though by his own hands, met with an accidental death within the terms of the policy.

Counsel for defendant asks, what does "external" mean? Can it be given any construction that will make it apply to violence done by the insured himself? Does it refer merely to the instrument of death? and says: "I submit that external violence is that coming from sources outside of the insured. Blackstone's death came about through internal means; that it was caused by his own hand, in a literal, if not in a legal, sense; that his hand moved in obedience to his will, however darkened his will may be; that it was not voluntary; that he was not trying to do something else; therefore the injury was not external or accidental." We do not agree with counsel in this proposition. We think the insured came to his death by violent, external, accidental injuries, within the meaning of this policy. Without going over the reasons brought to bear upon the questions, it is evident that the words "died by suicide," "death by his own hands," and other words of similar import, are held to be made applicable only to that class of cases where the insured comes to his death by his own voluntary act. This question has been settled by the jury; that the diseased was

¹*Trew v. Assurance Co.*, 5 Hurl. & N. 211; *Reynolds v. Insurance Co.*, 22 Law T. (N. S.) 820; *Winspear v. Insurance Co.*, 42 Law T. (N. S.) 900, affirmed 6 Q. B. Div. 42.

insane; that he took his own life; that he did not intend in cutting his throat to kill himself; and that he was not conscious that his death would be occasioned thereby. Let us suppose, as an illustration, that A. and B. take a policy of like terms and conditions as the one in suit, based upon similar applications, with all the conditions and provisions contained in the present case, and during the life-time of each of those policies A. becomes insane, and, while so insane, with a pistol shoots and kills B., and in the same moment turns the pistol and kills himself. No one would question but that by the terms and conditions of B.'s policy he had met with an accidental, external, and violent death, and the company would be held liable; that the case came within the provisions of the policy. Yet counsel for the defendant contends that, conceding that B. came to his death by accidental, external, and violent injuries, because inflicted by the hand of another, yet A., although insane, and wholly unconscious of the act of killing, not by force of his own will, but because he was bereft of reason, kills himself, it is not an external injury and accidental death, within the meaning of the policy. We think in a case of that kind A.'s death was as much an external, violent, accidental death as was the death of B. A. is no more responsible for the act than was B. It was involuntary; it was not the act of his own will; it was not his death by his own hand, in legal contemplation, but he came to his death at the hand of a madman, though that madman was himself. We think that the defendant, under the finding of the jury in this case, cannot now be heard to say that this was not an accidental death, and an external injury, coming within the terms of the policy.

We find cases in which it is held under like policies, where one becoming insane and falling down upon a railroad track is thereby killed by the passing of a train, that such cases come within the provisions of the policy, and the company would be liable. It is also held, where one, being insane, and through his insanity has placed himself in a dangerous position, where he would not have been found had he been in his right mind, and has met with an accidental death by reason of his insanity, that the company is liable, and recovery can be had. That where one in a fit of insanity involuntarily falls off a bridge and is killed, or falls into a stream and is drowned,—this being involuntary,—the company is liable. Yet counsel say that this class of cases are external injuries, injuries producing death of the insured from outside causes, and for that reason the company may be held liable. We think where one is so far beside himself, his intellect so darkened and obscured, that he may be neither morally nor legally responsible for his own acts and conduct, and in such condition produces his own death, it cannot be any more said to be his act than though the act had been committed by another, or the in-

sured had placed himself upon some dangerous height and fallen involuntarily, and had been dashed to pieces.

Some other questions are raised by the record, but we do not deem them of sufficient importance to discuss them here. We think the case was fairly submitted to the jury by the court, and fairly tried. The court, upon this question of insanity of the deceased, instructed the jury: "But, as I have before stated, the mere fact that a man kills himself does not of itself establish insanity. A man may do that by reason, as I stated, of lack of courage to undertake the work which his life seems to furnish for him; may get discouraged, and feel he would rather take his chances in the life to come than here. And if in that spirit he determined to take his own life, that would not be the taking of his life under the condition of mind which the law would say was in insanity. If you believe Mr. Blackstone took his life under such conditions, then the plaintiff cannot recover; otherwise, if you believe, as I have charged you, that he had no power to do it, and had not capacity of mind to do it, then the plaintiff would be entitled to recover, because, as I have instructed you, death under such circumstances would be accidental."

Some question is raised now by the defendant that there was proof of the insanity of the deceased some 20 years before the time of the taking out of the present policy. Some evidence was given of this upon the trial. Defendant's counsel insists that this was a concealment of a fact from the insurance company at the time of the application in the present case. This objection was overruled by the court below, and we think very properly, under the testimony of the defendant's own agent, Mr. H. E. Rich, who took the application in the present case. He testified that he remembered taking the application; that he wrote the body of it. He says he had a previous talk with Mr. Blackstone coming across on the Jackson branch from Tecumseh to Adrian, "and we renewed our talk in regard to accident insurance, and he thought he could not afford to take so much. I told him he could make it in two payments,—pay part in thirty days, and the balance in sixty days, for \$5,000, and \$25 weekly indemnity. He thought he would be able to make the payment in that way, and said he would talk with his wife in regard to it, and see whether she thought he had better do so. He never had carried any, he said, but he would come in and see me before he left town. He came in afterwards, and said he had concluded to take a policy. I took out the application and filled it out. He said he would take the amount we talked of, and I asked him his full name and who the beneficiary would be, and he told me. I asked him if he had any other accident insurance, and he said, 'No;' and I drew a line through it, and turned to him,—he sat opposite my desk,—and told him to sign on the line,—sign his name in full, same as I had written it in the

heading. He did so, and I took the application and put it in my drawer." On cross-examination the witness said: "I didn't notice any difference in him than in any other man that I had ever solicited. He was as well informed as ordinary men I talk with on the same subject. The question was the amount in case of death and the amount of indemnity; that is all that was talked over. I should say he was an ordinarily informed man. Not more than ordinarily well informed, as you meet them in soliciting insurance." No evidence was given or tending to prove that Blackstone was not sane at the time of the taking of this policy, or that he had had any trouble mentally for a period of 20 years. The court, in its direction to the jury, excluded this whole question, and told the jury that it was claimed on the part of the plaintiff, who introduced the testimony, that it tended to establish the fact of his insanity at the time of committing the

act; that it was claimed on the part of the defendant that it tended to establish that he was subject to mental disease, and that therefore, by the terms of the application, it was a false representation,—that Blackstone made a false representation in making the application, as regards that fact. But the court said: "Gentlemen, for neither of these purposes, nor for any other purpose, nor for any other purpose whatever in the case, shall you consider this testimony." And we think the court very properly excluded this from the consideration of the jury. We need not discuss the other questions raised. The judgment of the court below must be affirmed, with costs.

SHERWOOD, C. J., and MORSE and CHAMPLIN, JJ., concurred.

CAMPBELL, J., concurred in the result.

* * * * *

GILLESPIE et al. v. BEECHER.

(64 N. W. 167, 94 Mich. 374.)

Supreme Court of Michigan. Dec. 23, 1892.

Error to circuit court, Wayne county;
George S. Hosmer, Judge.

Action by Johanna Gillespie and another against Luther Beecher for unlawfully dispossessing plaintiffs of premises leased to them by defendant. A verdict was directed in defendant's favor on the opening statement of plaintiffs' counsel, and plaintiffs bring error. Reversed.

James H. Pound, for appellants.

Henry M. Cheever, for appellee, cited the following cases on the proposition that the plaintiff Johanna Gillespie, a married woman, had no power to enter into the lease: *Edwards v. McEnhill*, 51 Mich. 166, 16 N. W. Rep. 322; *Tillman v. Shackleton*, 15 Mich. 447; *Campbell v. White*, 22 Mich. 178; *De Vries v. Konklin*, Id. 255; *Powers v. Russell*, 26 Mich. 179; *Emery v. Lord*, Id. 431; *West v. Laraway*, 28 Mich. 464; *Ross v. Walker*, 31 Mich. 120; *Gillam v. Boynton*, 36 Mich. 236; *Jenne v. Marble*, 37 Mich. 319; *Kitchell v. Mudgett*, Id. 81; *Carley v. Fox*, 38 Mich. 387; *Johnson v. Sutherland*, 39 Mich. 579; *Russel v. Savings Bank*, Id. 671; *Gantz v. Toles*, 40 Mich. 725; *Insurance Co. v. McClellan*, 43 Mich. 564, 6 N. W. Rep. 88; *Buhler v. Jennings*, 49 Mich. 538, 14 N. W. Rep. 488.

DURAND, J. The declaration in this case charges that the plaintiffs, on August 31, 1888, were in possession of a house and premises which they were using as a dwelling house and as an hotel and boarding house, and that, being so in possession, the defendant unlawfully and forcibly entered and took possession thereof, and thereafter maintained his possession as against them, thus putting them in fear, depriving them of their home, and destroying their business as hotel or boarding house keepers. The defendant by his plea denied liability. The case came on to be tried, and in opening the case to the jury plaintiffs' counsel stated substantially that he intended to show that plaintiffs were husband and wife; that they were possessed of some property, and that in February, 1888, they entered into a joint lease, in which they were the tenants, and the defendant was the lessor, of the Globe or Dollar Hotel, on the corner of Jefferson avenue and Brush street, in Detroit, and which are the premises which it is claimed the defendant unlawfully took possession of; that the lessor insisted that the plaintiff Johanna Gillespie should join in the lease with her husband, and would not make the lease if she did not join, and that upon his insistence she did so; that the lease was then made to them jointly; that they entered into possession of the premises, and

while in peaceable possession thereof were unlawfully dispossessed by defendant; and that they suffered considerable damage in consequence. After this statement the circuit judge said: "I think, with reference to this matter that you may consider, that I will direct a verdict on the ground that it was incompetent for the husband and wife to join in the lease for the purpose of carrying on a partnership in the keeping of a boarding house or hotel. I will enter a direction to the jury to return a verdict for the defendant on the ground that Mrs. Gillespie was not a proper party to the lease." Exception was taken to this ruling by plaintiffs' counsel, and the only question to be passed upon in the case, therefore, is whether the husband and wife could join as plaintiffs in a suit to recover for an alleged invasion of the rights which they claim under a lease made by the defendant to them jointly. We have no doubt of their right to do so. The defendant was aware of the relation the plaintiffs sustained to each other at the time he made the lease to them, and insisted that the wife should be a party to it. Having done so, and put them jointly into possession of the premises under it, he is stopped from claiming that they had no right to join in a suit against him when he unlawfully disturbs them in that possession, and they sustain damage by reason of such disturbance. The married woman's act was passed for the protection of married women. It was intended as a shield, and not as a sword. Its purpose was to enlarge her rights, not to contract them, and certainly it was not meant to deprive her of the right, either acting alone, or jointly with others, of protecting her interests in property, either real or personal. The authorities referred to in the brief of the defendant's counsel are all cases where it was sought to make a married woman liable upon some executory contract, and it has been uniformly held in this state that she cannot become personally liable upon an executory contract except when it relates to her sole property, or where the consideration moves directly to her, and it has also been held that she cannot be made liable personally as a surety for the debts either of her husband or any other person, or by reason of her being a partner with her husband. In all these cases she is held to be legally incompetent to bind herself. These rules, however, are all intended for her benefit, and are in direct antagonism with the doctrine that she cannot protect her title or possession to property when such title or possession, either as a sole or joint owner, is attacked. To give sanction to such a doctrine would place married women at a serious disadvantage, and one which the law does not inflict upon her. For the reasons stated the judgment must be reversed, and a new trial granted. The other justices concurred.

ARTMAN et al. v. FERGUSON et al.
(40 N. W. 907, 73 Mich. 146.)

Supreme Court of Michigan. Nov. 28, 1888.

Error to circuit court, Jackson county; Lane, Judge.

Thomas A. Wilson, for appellants. Richard Price and Austin Blair, for appellees.

LONG, J. This action is brought in the circuit court for the county of Jackson, on the common counts in assumpsit, to recover for goods sold and delivered to the defendants, doing business at Jackson as Peter Ferguson & Co. The defendants are husband and wife, and the plaintiff sought to show that, after their marriage, they formed a copartnership, and carried on the retail carpet business in the city of Jackson under the firm name of Peter Ferguson & Co., and that during such time the goods involved in this suit were sold to them: that Margaret W. Ferguson was, at the time of the formation of such copartnership, possessed of property in her own right, of the value of \$20,000, and furnished the entire capital for the business, and provided a place to carry on such business; that Peter Ferguson had no means, and was to and did manage the business; that the copartnership continued until after the last item of goods mentioned in the bill of particulars was sold. This evidence was objected to by defendants' counsel, on the ground that it was not competent for husband and wife to enter into a copartnership with each other. The circuit court sustained the objection, and directed a verdict for defendants. Plaintiffs bring the case to this court by writ of error.

The only question arising is whether the husband and wife can enter into a contract of partnership between themselves, and thus render themselves jointly liable for the contracts of the firm thus established. At the common law married women were incapable of forming a partnership, since they were disabled, generally, to contract or to engage in trade; and the husband and wife were wholly incapacitated to contract with each other. Whatever rights or powers the husband and wife have to contract with each other, or that the wife may have to enter into a copartnership to carry on trade or business, must be conferred by our constitution and statutes. There was never any impediment to the acquisition of property through purchase by a married woman. The difficulty was that at the common law the ownership passed immediately to the husband by virtue of the marriage relation. Our statute has not removed all the common-law disabilities of married women. It has not conferred upon her the power of a *feme sole*, except in certain directions. It has only provided that her real and personal estate acquired before marriage, and all property, real and personal, to which she may afterwards become entitled in any manner, shall be and remain her estate, and shall not be liable for the debts, obligations, and

engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, and bequeathed by her as if she were unmarried; and she may sue and be sued in relation to her sole property as if she were unmarried. How. St. §§ 6295-6297. In all other respects she is a *feme covert*, and subject to all the restraints and disabilities consequent upon that relation. A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. That a married woman may, when she has separate estate, be a copartner with a person other than her husband, is held in many states under the married woman's statutes. But where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law provides that she cannot enter a firm. It has been held by a great preponderance of authorities, even under the broadest statutes, that a married woman has no capacity to contract a partnership with her husband, or, in other words, to become a member of a firm in which her husband is a partner, even in those states in which she may embark in another partnership; and though she holds herself out as such partner, and her means give credit to the firm, she is held not liable for the debts, as she cannot, by acts or declarations, remove her own disabilities. *Lord v. Parker*, 3 Allen, 127; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Haas v. Slaw*, 91 Ind. 384; *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654; *Kaufman v. Schoeffel*, 37 Hun, 140; *Cox v. Miller*, 54 Tex. 16; *Mayer v. Soyster*, 30 Md. 402. In this state a married woman was subject to the common-law disabilities of coverture until the passage of the married woman's act of 1855. How. St. §§ 6295-6299. This act does not touch a wife's interest in her husband's property, and these remain under the restrictions of the common law, unless they are removed by some other statute. The wife's common-law disabilities are only partially removed by the act, and one who relies on a wife's contract must show the facts in order that it may appear whether she had capacity to make it. *Edwards v. McEnhill*, 51 Mich. 161, 16 N. W. 322. Under our statutes a wife has no power to contract except in regard to her separate property. The constitution and statutes are clear against her right to make a mere personal obligation unconnected with property, and not charging it, so that she cannot become personally bound jointly with her husband, nor as a surety, by mere personal promise. *De Vries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 Mich. 464; *Emery v. Lord*, 26 Mich. 431. In *Jenne v. Marble*, 37 Mich. 326, Mr. Justice Campbell, speaking with reference to a lease, said: "The language of the statute is no broader than the equitable rules concerning separate property and down in the same words in most of the old decisions. The

disabilities of testimony are entirely inconsistent with the idea that husband and wife may deal with each other as third persons can. This is impossible, if they cannot testify concerning these contracts; and when the law recognizes, as it always has done, the peculiar power of substantial coercion possessed by husbands over wives, it would not be proper to infer any legal intent to remove protection against such influence from any vague provisions which no one supposes were ever actually designed to reach such a result, and which can only be made to do it by an extended construction. Any one can readily see the mischiefs of allowing persons thus related to put themselves habitually in business antagonism, and legislation which can be construed as permitting it is so radically opposed to the system which is found embodied in our statutes generally that it should be plain enough to admit of no other meaning." It is the purpose of these statutes to secure to a married woman the right to acquire and hold property sepa-

rate from her husband, and free from his influence and control, and if she might enter into a business partnership with her husband it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women. This doctrine was laid down in *Bassett v. Shepardson*, 52 Mich. 3, 17 N. W. 217, and we see no reason for departing from it. The important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property and a joint power of disposal and a mutual liability for the contracts and obligations of each other. The judgment of the court below must be affirmed, with costs. The other justices concurred.

J. I. CASE THRESHING MACHINE CO. v. MITCHELL et al.

(12 N. W. 151, 74 Mich. 679.)

Supreme Court of Michigan. April 24, 1889.

Appeal from circuit court, Huron county, in chancery; WATSON BEACH, Judge.

George P. Voorheis, for appellant. *Elbridge F. Bacon*, for appellees.

LONG, J. On April 2, 1883, George W. Mitchell and wife, Sarah Jane Mitchell, two of the above defendants, made and executed an indenture of mortgage to George W. Jenks, administrator, etc., covering the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 22, township 16 N., of range 15 E., Huron county, Mich. This mortgage was recorded in the office of the register of deeds of Huron county, on April 5, 1883, and was thereafter duly assigned in writing by said Jenks to Margaret L. Davidson, the other defendant. The mortgage was given for the sum of \$182.28, and was to come due on or before April 2, 1888, with interest payable annually. For non-payment of interest when due the mortgagee had the option in the said mortgage to declare the whole amount of principal and interest due, and the right to foreclose the same under the power of sale contained in the mortgage. The interest remaining unpaid on November 10, 1887, the assignee of the mortgage, Mrs. Davidson, declared the whole amount and interest due, and commenced a statutory foreclosure, by the publication of the usual notice, claiming there was due on the mortgage and note for principal and interest the sum of \$254.78. On the same day this mortgage was given, George W. Mitchell conveyed to his wife, Sarah Jane Mitchell, the north 45 acres of the premises covered by this mortgage, by deed of warranty containing the usual covenants of seisin, and that the premises were free from all incumbrances. The north 45 acres included the homestead of George W. Mitchell and wife; the dwelling-house and appurtenances where they resided being situate thereon. On September 16, 1886, George W. Mitchell, being indebted to the J. I. Case Threshing-Machine Company, complainant, in the sum of \$700, gave his promissory notes for that amount to it; and to secure the payment of said notes he, with his wife, Sarah Jane Mitchell, made and executed a mortgage for said amount on the same date to said complainant, covering the south 35 acres of the premises described in the mortgage to George W. Jenks. This amount was due under said mortgage in installments: \$150, October, 1887; \$200, December 1, 1887; \$150, October, 1888; \$200, December 1, 1888. Default having been made in the payment of the first two installments of this mortgage, on February 4, 1888, complainant filed its bill in the circuit court, in chancery, of Huron county, to foreclose said mortgage, and to

restrain the sale of the premises under the foreclosure by Margaret L. Davidson of her mortgage, which was to take place under such notice on February 7, 1888. Upon filing this bill, an injunction was allowed by the circuit judge restraining the sale under the Davidson mortgage. The complainant in its bill prays that Margaret L. Davidson be compelled under such foreclosure to sell the north 45 acres of the premises first, before resorting to or selling the south 35 acres of the premises covered by its mortgage. The defendants all appeared and answered. The defendant Sarah Jane Mitchell in her answer alleged her homestead interest in the north 45 acres, and her purchase from her husband, and prayed that the south 35 acres be first sold under the Davidson mortgage, before sale should be made of the 45 acres so owned by her. Defendant Davidson also answered, and prayed foreclosure of her mortgage upon the whole tract covered thereby, and for her costs in the proceedings.

On the hearing in the circuit, the court decreed that the south 35 acres be first sold under the Davidson mortgage, and that if a sufficient sum should be realized at such sale, that the north 45 acres should be released from the lien of that mortgage. The court found due on the complainant's mortgage the sum of \$317.80, and decreed that George W. Mitchell pay the same, with interest and costs, on or before February 17, 1889, and that in default thereof a sale be made of the 35 acres so covered by said mortgage. The court also found due on the Davidson mortgage the sum of \$271.46, and ordered payment thereof by George W. Mitchell and Sarah Jane Mitchell, with interest and costs, on or before February 17, 1889; and in default that defendant Davidson first proceed to a sale of the south 35 acres of said premises; and that, if that was insufficient to pay the amount due, then a sale of the north 45 acres to be made. The court ordered, further, that complainant pay to Margaret L. Davidson the sum of \$42.30, the amount of costs and expenses incurred by her in her foreclosure proceedings by advertisement. The court also decreed that complainant pay the sum of \$25 as costs to defendant Sarah Jane Mitchell. From this decree complainant appeals.

The deed was made and delivered to Sarah Jane Mitchell by her husband, and by her placed upon record, prior to the time of the execution and delivery of the complainant's mortgage. At the time of the taking of his mortgage the complainant not only had notice by the record that the whole 80 acres was incumbered by the Davidson mortgage, but also that the title to the north 45 acres had been transferred by George W. Mitchell to his wife, Sarah Jane Mitchell, and that the legal title to that parcel was vested in her at the time of the giving of the mortgage to complainant. Where a part of the mortgaged premises has been aliened by the mortgagor

subsequent to the mortgage, the rule in equity, on a foreclosure and sale, is to require that part of the premises in which the mortgagor has not parted with his equity of redemption to be first sold, and then, if necessary, that which has been aliened, and, where the latter is in possession of different vendees, in the inverse order of alienation. This rule rests upon the ground, chiefly, that where one who is bound to pay a mortgage confers upon others rights in any portion of the property, retaining other portions himself, it is unjust that they should be deprived of their rights, so long as he has property covered by the mortgage out of which the debt can be made. In other words, his debt should be paid out of his own estate, instead of being charged in the estate of his grantees. *Mason v. Payne*, Walk. Ch. 460; *Cooper v. Bigly*, 13 Mich. 463.

The deed from Mitchell to his wife contains the usual covenants of warranty, and it is evident therefrom that it was the intention of the grantor in his deed to charge the part remaining in him first to the payment of this mortgage. These covenants of warranty became important in determining the intent of the mortgagor not to charge the mortgage on the property sold. If the bill had been filed to foreclose the Davidson mortgage, and the rights of complainant had not intervened, no one would deny the right of the defendant Sarah J. Mitchell, the grantee in the deed, to have the 35 acres remaining in her grantor first sold to satisfy the mortgage, before the portion purchased by her should be made liable to its payment under the rule above stated. It is insisted, however, by counsel for complainant, that the defendant Sarah J. Mitchell, having signed the Davidson mortgage, and taken a deed from her husband of the 45 acres, it was charged with its proportionate share of the lien, the same as if she had purchased the whole 80. This fact could not affect her right to have the south 35 acres remaining in her husband first sold. The mortgage was given to secure the payment of the debt of the husband, and she in its execution only barred her dower. She was not personally liable for the debt, and could not be held liable upon any covenant contained in the mortgage. Such a covenant would be a mere nullity, so far as her rights were concerned. The statute does not empower her to make contracts generally, but only in respect to her own property. *Kitchell v. Mudgett*, 37 Mich. 82.

Counsel for complainant further contends that, Sarah J. Mitchell having signed both mortgages, her equities in and to any portion of the 80 acres are not greater than the equities of the mortgagees; and that, having signed and executed both mortgages voluntarily, she is estopped from assuming any position that will tend to depreciate or destroy the rights and equities created by such mortgages. What rights and equities has

the complainant, as against Sarah J. Mitchell, in the north 45 acres of this land? Its mortgage does not cover this parcel. When it took the mortgage the Davidson mortgage was a lien upon that parcel as well as upon the south 35 acres, and at that time the title to this 45 acres was in Mrs. Mitchell under a conveyance from the mortgagor in the Davidson mortgage. At this time Mrs. Mitchell had the right to have this 35 acres first sold to pay for the Davidson mortgage. How can it be said that by the giving of the mortgage to complainant upon the 35 acres Mrs. Mitchell lost her right to have it first sold to satisfy the Davidson mortgage? This is not so, though she joined with her husband in its execution. This was also given to secure the payment of the debt of the husband, and no equities could arise in favor of complainant against her to compel the sale of her land first to pay and discharge the Davidson mortgage. In *Kitchell v. Mudgett*, supra, a bill was filed to foreclose a mortgage signed by the defendant as wife of the mortgagor, on land belonging to the husband; the defendant having a prior mortgage on the same premises. It was claimed that the wife, in uniting in the mortgage to complainant, transferred her own mortgage interest, and subjected it to the lien of the mortgage she signed. It was held that her act had no such effect, and her mortgage was given priority of lien. Sarah J. Mitchell's rights in the 45 acres are in no manner affected by the giving of this mortgage to the complainant, and no equities arise in favor of complainant to have this parcel first sold. Complainant took its mortgage after the rights of Sarah J. Mitchell had become fixed under her deed as to the Davidson mortgage, and that was to have the 35 acres then remaining in her husband, her grantor, first sold, to pay the Davidson mortgage; and the fact that she joined in the mortgage to complainant with her husband did not and could not affect her rights in the 45 acres, and no equities arise in favor of complainant to have it so declared. The only effect of joining in this mortgage is to bar any dower she might have upon a foreclosure and sale of the premises.

Some question is raised by counsel for complainant relative to costs allowed by the court below. Margaret L. Davidson was proceeding to a foreclosure and sale by advertisement of the premises under her mortgage. This she had a right to do, under the power of sale contained in the mortgage. Complainant by injunction restrained the sale, and made Mrs. Davidson a party defendant to its bill, the effect of which was that Mrs. Davidson lost her costs and expenses incurred in the advertising of her foreclosure. These costs the court very properly allowed her.

Mrs. Mitchell was also allowed \$25 as costs by the court below. We think this was an amount which the defendant might reasonably recover. By her answer in the

nature of a cross-bill she was asking affirmative relief; that is, that the 35 acres be first sold under the Davidson mortgage. This relief the court granted, and gave the defendant costs within the rule.

Counsel for complainant asks, on the hearing here, that it be permitted to redeem from the Davidson mortgage. This will be granted. The decree of the court below will be so modified that complainant may pay to Margaret L. Davidson the amount of the mortgage as fixed by the court below, together with interest thereon from the date of such decree at the rate drawn by said mortgage, and costs fixed by the court below to be paid

to her within 90 days from date hereof, and upon such payment be subrogated to all the rights of Margaret L. Davidson therein, and all her rights under said decree, by filing the receipts for such payments with the register of this court. The decree of the court below must be affirmed in all other respects, except as to the time of the payments of the money to be paid under the terms of said decree, which shall be paid within 90 days from this date, in default of which the parties may proceed to a sale of the premises. The defendants, in addition to the costs recoverable in the court below, shall recover their costs in this court. The other justices concurred.

LOW et al. v. PEW et al.

(108 Mass. 347.)

Supreme Judicial Court of Massachusetts.
Essex. Nov. Term, 1871.

Replevin by the firm of Alfred Low & Co. of a lot of fitched halibut from the assignees in bankruptcy of the firm of John Low & Son, all of Gloucester. Writ dated August 24, 1869. The parties stated the following case for the judgment of the court:

On April 17, 1869, as the schooner *Florence Reed*, owned by John Low & Son, was about to sail from Gloucester on a fishing voyage, that firm received \$1,500 from the plaintiffs, and signed and gave the plaintiffs the following writing:

"We, John Low & Son, hereby sell, assign, and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner *Florence Reed* on the voyage upon which she is about to proceed from the port of Gloucester to the Grand Banks, at the rate of five cents and a quarter per pound for fitched halibut, to be delivered to said Alfred Low & Company as soon as said schooner arrives at said port of Gloucester, at their wharf. And we, the said John Low & Son, hereby acknowledge the receipt of \$1,500 in part payment for the halibut that may be caught by the master and crew of said schooner on said voyage."

In July, 1869, proceedings in bankruptcy were begun against John Low & Son in the district court of the United States for this district, in which they were adjudged bankrupts on August 6th, and on August 20th these defendants were appointed the assignees in bankruptcy, and the deed of assignment was executed to them. On Saturday, August 14th, the *Florence Reed* arrived at the port of Gloucester on her home voyage, and was hauled to the plaintiffs' wharf; and on the morning of Monday, August 16, the United States marshal took possession of the vessel and cargo under a warrant issued to him on August 6th in the proceedings in bankruptcy, and transferred his possession to the defendants upon their appointment.

The catch of the schooner consisted of about 40,000 pounds of halibut, and of some codfish. The plaintiffs demanded the halibut of the defendants, and offered at the same time to pay the price of it at the rate of five and a quarter cents per pound, less the \$1,500 already paid. The defendants refused the demand; and the plaintiffs then replevied such a quantity of the halibut as represented the amount of \$1,500 at that rate per pound, and offered to receive the rest of the halibut and pay for it at the same rate, but the defendants refused to acknowledge any right whatever of the plaintiffs in or to the fish.

If on these facts the plaintiffs were entitled to recover, they were to have judgment for nominal damages; but, if otherwise, the defendants were to have judgment for a re-

turn, with damages equal to interest at the annual rate of six per cent. on the appraised value of the fish replevied.

C. P. Thompson, for plaintiffs. W. C. Endicott, for defendants.

MORTON, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. *Williams v. Merritt*, 103 Mass. 181. The firm could not, by a subsequent sale and delivery, transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. *Jones v. Richardson*, 10 Mete. (Mass.) 481. The same principle is applicable to all sales of personal property. *Rice v. Stone*, 1 Allen, 566, and cases cited; *Head v. Goodwin*, 37 Me. 181.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no

interest. 2 Kent, Comm. (10th Ed.) 468, (641) note a; *Jones v. Richardson*, 10 Mete. (Mass.) 481; *Bellows v. Wells*, 36 Vt. 599; *Van Hoozer v. Cory*, 31 Barb. 9; *Grantham v. Hawley*, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In *Mulhall v. Quinn*, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In *Hartley v. Tapley*, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent, and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time

of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of or interest in the fish, and that the sale to the plaintiffs was void.

The plaintiffs rely upon *Gardner v. Hoeg*, 18 Pick. 168, and *Tripp v. Brownell*, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which, under the shipping articles, would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered.

Judgment for the defendants.

BATES v. SMITH.

(47 N. W. 249, 83 Mich. 347.)

Supreme Court of Michigan. Nov. 21, 1890.

Error to circuit court, Saginaw county; C. H. Gage, Judge.

Brooks & Conway, for appellant. Trask & Smith, for appellee.

LONG, J. This is an action of trover to recover the value of one-half interest in a colt. The claim of the plaintiff is that he bred the mare of one James Fraser upon shares. The contract as stated by the plaintiff is that Fraser came to his farm, and said he wanted to breed his mare to the stallion American Boy, then kept by plaintiff, and that he had no money; that plaintiff then told him he would breed the mare on shares, and, if Mr. Fraser would come to him at any time within two weeks and give him \$50 for the services of the horse, Fraser could have his (the plaintiff's) half-interest in the colt; that the mare was then and there bred under that arrangement, but no written contract was made. James Fraser was called as a witness for the defendant upon the trial, and testified: "My bargain with plaintiff that, if I did not pay plaintiff fifty dollars within three months, for the service of the stallion, he (plaintiff,) was to own a half-interest in the colt." On cross-examination he states the arrangement substantially as claimed by plaintiff, except that he was to have three months in which to pay the money. It appears that the mare was bred July 27, 1888, and that the defendant purchased her from Fraser on February 21, 1889, paying therefor the sum of \$300. Defendant upon the trial stated that at the time he purchased the mare he had no knowledge that the plaintiff made any claim to her progeny, and that plaintiff never made any claim until the colt was four or five months old. It appeared, however, that before defendant bought the mare he was informed that Fraser had bred to the stallion American Boy then kept by plaintiff, but was not advised that any contract was made by which the plaintiff was to have a half-interest in the colt. Demand was made before suit was brought, and the defendant refused to recognize the plaintiff's interest. Under these facts, the plaintiff's counsel requested the court to instruct the jury that Fraser could not sell the interest of plaintiff in the colt, and that the colt when foaled was the property in common of the plaintiff and defendant, and that the value of the one-half interest could be recovered in this action. This the court refused, and instructed the jury that if at the time the defendant purchased the mare from Fraser he had no knowledge of the arrangement made between plaintiff and Fraser, the title to the colt would pass to the defendant, but that if he did have knowledge of it, the title would

not pass. The jury found a verdict in favor of defendant. Plaintiff brings error. It is contended by plaintiff's counsel that the defendant was not in any sense a bona fide purchaser of the colt, but that, if he were, he could acquire from Fraser only his half-interest therein.

It is a general rule that owners in common of property have a right to dispose of their own undivided shares, but such owner cannot sell the whole property, nor any portion thereof except his own; and, if he undertakes to dispose of any larger interest his co-owners are not bound thereby. *Russell v. Allen*, 13 N. Y. 173. The principle is well settled that a seller of personal property can convey no greater title than he has, and it makes no difference that the purchaser has no notice and is ignorant of the existence of the other parties in interest. *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158; *Tuttle v. Campbell*, 74 Mich. 660, 42 N. W. 381. Did the contract, however, which plaintiff claims he made with Fraser convey to him one-half interest? The property upon which the contract was to operate had no potential existence. The mare at that time had not been bred, and it was uncertain that, when bred, she would be put in foal. There was nothing in existence which could be the subject of sale. It is essential to the validity of every executed contract of sale that there should be a thing or subject-matter to be contracted for. And if it appears that the subject-matter of the contract was not, and could not have been, in existence at the time of such contract, the contract itself is of no effect, and may be disregarded by either party. *Strickland v. Turner*, 7 Exch. 208; *Hastie v. Conturier*, 9 Exch. 102, 5 H. L. Cas. 673; *Franklin v. Long*, 7 Gill & J. 497. A mere possibility or contingency, not founded upon a right, or coupled with an interest, cannot be the subject of a present sale, though it may be of an executory agreement to sell. *Purcell v. Mather*, 35 Ala. 570; *Low v. Pew*, 108 Mass. 347. Though the subject-matter of the agreement has neither an actual nor potential existence, such an agreement is usually denominated an executory contract, and for its violation the remedy of the party injured is by an action to recover the damages. *Hutchinson v. Ford*, 9 Bush. 318; *Pierce v. Emery*, 32 N. H. 181. Again, it may be said that, where one of two innocent parties must suffer by the fraud of another, he shall bear the loss who by his conduct has enabled such third party to perpetrate the fraud. If the contract was made as claimed by the plaintiff, and there does not seem to be much controversy on this point, yet the plaintiff had it in his power to protect himself, under the provisions of Act No. 280, Pub. Acts, 1887. This act provides that the owner or keeper of a stallion shall, after demand upon the owner of the mare for the price agreed upon

for service, have a lien upon the get of such stallion for the period of six months after the birth of the foal, for the payment of the services of such stallion. In order, however, to perfect such lien, he must file with the township clerk in the town where such dam is owned the agreement or a true copy of such agreement entered into by the owner of the dam for such services, together with the description of such dam as to age, color or other marks as the person filing such agreement is able to give. This filing is to operate, under the provisions of this act, as a chattel mortgage, and may be enforced in the same way. No such steps were taken. The mare remained in the possession of the owner, Mr. Fraser, from the time she was bred until in February following, when the defendant purchased her without any notice, so far as this record discloses, of the agree-

ment made between plaintiff and Fraser. It is shown that defendant was advised at the time he purchased that the mare had been bred to American Boy, but no notice was given him that plaintiff had any claim on the foal, and there was nothing upon the record in the town-clerk's office to give him any notice that plaintiff claimed a lien upon or had any interest in the foal. It cannot be said that the mere fact of notice of the breeding of the mare to American Boy was sufficient to put him upon inquiry as to any rights the owner of the stallion might have. The defendant must be regarded as a bona fide purchaser and owner of the mare; and, the title and ownership of the foal following the dam, he was the rightful owner of the foal. We see no error in the case, and the judgment must be affirmed, with costs. The other justices concurred.

DICKEY et al. v. WALDO.

(56 N. W. 608, 97 Mich. 255.)

Supreme Court of Michigan. Oct. 27, 1893.

Error to circuit court, Allegan county; George M. Buck, Judge.

Action by John W. Dickey and Addison Lurvey against George W. Waldo for the conversion of peaches grown on defendant's land, and of which plaintiffs claimed to be the owners under a contract with defendant's grantor. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

The contract and findings referred to in the opinion are as follows:

Contract: "Articles of agreement, made this 21st day of February, A. D. 1885, between John Schultz, of the township of Saugatuck, Allegan county, Michigan, of the first part, and John W. Dickey and Addison Lurvey, of Douglas, county and state aforesaid, of the second part, witnesseth as follows: The said party of the first part is the owner of the west half of the east half of the southwest quarter of section twenty-five, township of Saugatuck, aforesaid, and desiring to set out to peach trees a piece just east of his house, and running back to his east line, and far enough south as the piece is suitable for peach trees, but not to exceed 1,500 trees, said first party agrees to set out the trees, and care for and cultivate the same, in a good and workmanlike manner, for the period of ten years from the date hereof, and to allow said Dickey and Lurvey, parties of the second part, to have and take one-half of the crop of peaches for any two years they may select during the aforesaid term of ten years. Said Schultz agrees that, if it shall come to his knowledge that any of the said trees are affected with the yellows, that he will immediately dig up and burn the same, root and branch. Said Dickey and Lurvey, parties of the second part, hereby agree, in consideration of the agreements hereinbefore stated, to be performed upon the part of the said Schultz, to furnish what trees may be needed to set the aforesaid piece of land, not to exceed 1,500 trees, and take as pay therefor one half of the crop of peaches for any two years they may select. It is mutually agreed that said Dickey and Lurvey shall make their selection of the year when they will take the half of the crop on or before September 15th of that year. Each party hereto are to pick and care for their own share of the fruit and are to each take as near half of the crop as may be; but at the close of the season each shall show up their total shipments for the season, and, if it be found one party has taken more than the other, the net proceeds of such surplus shall be equally divided between the parties hereto. Said Schultz agrees to draw that half of the fruit belonging to said Dickey and Lurvey to the boat landing in Douglas, or railroad

depot at Fennville, as they may direct. This agreement to be binding upon the legal representatives of the parties hereto. Said second party agrees to furnish a man to help set out the trees. Witness our hands and seals, John W. Dickey, [L. S.] John Schultz, [L. S.] A. Lurvey, [L. S.] In presence of May Belle Spencer, Dyer C. Putnam.

"State of Michigan, County of Allegan, ss.: On this third day of March, A. D. 1885, before me, a notary public in and for said county, personally came John W. Dickey, Addison Lurvey, and John Schultz, to me known to be the persons whose names are subscribed to the written instrument hereon, and each acknowledged that they executed the same for the purpose therein mentioned. Dyer C. Putnam, Notary Public."

"Counsel for the respective parties above named having requested the court to make and file in said cause a finding of the facts, and conclusions of law therefrom, the court, in compliance with such request, finds the facts in said cause, as proved on the trial thereof, to be as follows: (1) That on the 21st day of February, A. D. 1885, John Schultz was the owner and in possession of the west half of the east half of the southwest quarter of section twenty-five, in the township of Saugatuck, in said Allegan county, and state aforesaid. (2) That on said day above named the said John Schultz entered into a contract in writing with the said plaintiffs, which contract bore date the day and year aforesaid, and was introduced in evidence on the trial of said cause. (3) That, at the time said contract was entered into, said parcel of land described in said contract was the homestead of said John Schultz and Deborah Schultz, his wife. (4) That the plaintiffs, in the spring of 1885, furnished the peach trees required in and by the terms of said contract, and set them on the land described in said contract, and in all things performed the agreements by them to be performed, according to the terms of said contract. (5) That on or about the 23d day of April, A. D. 1887, the said John Schultz and wife conveyed the premises described in said contract to the defendant by warranty deed, with covenants of title, and against incumbrances. (6) That, before and at the time of the execution and delivery of said deed by said John Schultz and wife to said defendant, he, the said defendant, had actual notice and knowledge of the existence and terms of said contract between said Schultz and said plaintiffs, and that, before and at the time of the execution and delivery of said deed, it was agreed between said Schultz and said defendant that said defendant should pay said Schultz \$1,850 for said land, instead of \$2,000, the full purchase price thereof, and that, as part of the consideration for the sale of said land, said defendant should settle with said plaintiffs for their interest in the peach trees on said land; said defendant at that time suppos-

ing that said plaintiffs would take for their interest in said trees the value of said trees at the time of setting, and interest thereon. (7) That the plaintiffs duly selected the year 1891 as one of the years when they would take one-half of the crop, according to the terms of said contract; that said defendant was orally informed by said plaintiffs of such selection July 4, 1891, and that on or about August 22, 1891, the said plaintiffs gave said defendant written notice of such selection, and afterwards, and on or about the 26th day of August, 1891, offered and attempted to pick their share of the fruit, but defendant refused to permit them to do so, and denied that they had any share of the fruit; and that defendant took and converted to his own use the entire crop of fruit grown on said trees during that year. (8) That the value of the peaches grown during the year 1891 on the trees set by said plaintiffs on said land, under said contract, amounted to the sum of \$1,541.97 at the time of the conversion of the same by said defendant to his own use, and that the value of one-half of the peaches, at the time when they were so converted by said defendant to his own use, was the sum of \$770.53. (9) That the value of one-half of the peaches converted to his own use by said defendant before August 22, 1891, was the sum of \$160, as near as the same can be now determined. From the foregoing facts, I find the following conclusions of law: (1) The plaintiffs are entitled to maintain this action, and the contract offered in evidence between said Schultz and said plaintiffs was admissible in evidence. (2) Said contract did not convey to the plaintiffs any interest in the land described in said contract, except the right to said plaintiffs to take therefrom one-half of the crop of peaches for any two years they might select during the period of ten years from the date of said contract. (3) The homestead right of John Schultz and wife was in no way affected by said contract, and the question of the homestead right of said Schultz and wife cannot be raised by said defendant in this action. (4) Whether said contract was entitled to record or not, or whether such record would be constructive notice to defendant or not, is immaterial, inasmuch as defendant had actual notice of such contract before he purchased said land. (5) The contract relation between Schultz and plaintiffs was not technically a sale of the peaches thereafter to be grown on said trees by said Schultz to plaintiffs, but was more in the nature of a sale of the trees by plaintiffs to Schultz; plaintiffs reserving, in writing, one-half of the products of said trees for any two years they might select during the period of ten years. (6) The defendant, having notice of said contract before his purchase of said land, and having agreed, for a valuable consideration, to recognize the rights of plaintiffs under said contract, cannot now claim that said con-

tract was void, or that it was not binding upon him. (7) The defendant and plaintiffs were the owners in common of the crop of peaches grown on said trees during the season of 1891, and the defendant having refused to allow plaintiffs to pick their share of said crop, and denied that plaintiffs had any right to any part of said crop, plaintiffs were entitled to their action of trover without and before any accounting as to the amount of said crop, or the share of each of the others therein. (8) Plaintiffs are entitled to recover in this action, and a judgment should be rendered in their favor, and against said defendant, for the said sum of \$770.53, with interest on the same from October 15, 1891,—\$23.12,—making a total of \$793.65, with costs of suit to be taxed. Geo. M. Buck, Circuit Judge. April 15th, 1892."

W. B. Williams & Son, (Hanibal Hart, of counsel,) for appellant. Padgham & Butler, for appellees.

GRANT, J. The contract and the finding of facts in this case are found in the margin. This contract and the judgment should be sustained, unless there are some inexorable rules of law which stand in the way. Two rules are invoked to defeat the plaintiffs' action: (1) That the land upon which the peach trees were planted is a homestead; that Schultz's wife did not sign the contract; that it interferes with the homestead right, and the contract is therefore void. (2) That the crop which the plaintiffs agreed to take in payment for the trees was not in esse at the time, and therefore not the subject of sale.

1. We think there is no force in the first proposition. Schultz's land consisted of 40 acres. The trees were planted upon only a portion of it. The occupation and possession of the buildings and land were not interfered with. During the growth of the trees, the land could be cultivated, and crops raised. If the trees proved valueless, neither Schultz nor his wife had suffered. If they proved valuable, which was the fact, then the homestead itself was increased in value. Under these circumstances, we see no reason in holding that either Schultz or his wife had parted with any homestead right, or that their possession was in any manner interrupted.

2. Such contracts are reasonable, and beneficial to both the vendor and the vendee. They are especially beneficial to the vendee. He avoids all expense except his labor, runs no risk, and, if in indigent circumstances, he may obtain gains which would otherwise be beyond his reach. Such contracts are of common occurrence, and, if the rigid rules of law are against their validity, there is a necessity of legislative action to render them valid. The rule of law is well established that things having no potential existence cannot be the subject of mortgage and sale.

There are, however, exceptions to this rule, as where a merchant mortgages his stock of goods, and all future additions thereto. It is unnecessary to cite authorities to this proposition. The difficulty seems to arise in determining what comes within the definition of the term "potential existence." The definition of the word "potential" is: "Having latent power; endowed with energy adequate to a result; efficacious; existing in possibility, not in actuality." Sir W. Hamilton said: "Potential existence means merely that the thing may be at some time; actual existence, that it now is." In the legal sense, things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. The following rule appears to be well established both by reason and authority, viz.: That, while one owns property from which such product naturally arises, such product may be the subject of sale and mortgage. The authorities which thus hold also recognize the other rule above stated. The authorities are by no means uniform, but we think the conflict in them has arisen from a failure to make a proper distinction. In *Grantham v. Hawley*, 110b. 132, it was held that a grant of that which the grantor has potentially, though not actually, is good, as a grant by the lessee of all the corn that shall be growing on the land at the end of the term. It was there said: "Though the lessor had it [the corn] not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." Powell, in his *Treatise on Contracts*, says: "Although it be uncertain whether the thing granted will ever exist, and it consequently cannot be actually in the grantor, or certain, yet it is in him potentially, as being a thing accessory to something which he actually has in him, for such potential property may be the subject of a contract executed, as a grant, or the like. * * * So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then in esse." It is held that a lease of land, reserving rent, and which provides that all the crops raised on the land during the term are to be the property of the lessor until the rent is paid, is valid, and will entitle the lessor to hold such crops against the creditors of the lessee. *Smith v. Atkins*, 18 Vt.

461. Justice Redfield, in delivering the opinion, said: "It is, without doubt, true that the sale of a thing not in existence is, upon general principles, inoperative, being merely executory; that is, it confers no title in the thing bargained. But when the thing thereafter to be produced is the produce of land, or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors." In *Jones v. Webster*, 48 Ala. 112, it is said: "If the mortgagors had undertaken to convey the future crops they might make, without possessing any land upon which to make them, and especially without the contemplation of the immediate acquisition of some, then, certainly, their conveyance would be without operation. In this case they had the land, and the crops conveyed were to be grown upon it during their possessory interest. The crops were an accretion or addition to the land which might very reasonably be expected to be made. They were therefore proper subjects of mortgage." In *McCaffrey v. Woodin*, 65 N. Y. 464, it is said: "It is well settled that a grant of the future produce of land actually in possession of the grantor at the time of the grant passes an interest in such future crop as soon as it comes into existence." It was held in *Andrew v. Newcomb*, 32 N. Y. 417, Chief Justice Denio rendering the opinion, that crops to be raised by the owner of the land are an exception to the general rule that the "title to property not in existence cannot be affected so as to vest the title when it comes into existence," and that "the owner of land may lawfully contract for its cultivation, and may provide in whom the ownership of the product shall vest." In *Watkins v. Wyatt*, 9 Baxt. 250, Wyatt agreed to furnish one McCain with supplies on condition that McCain, who was a farmer, should execute to him a mortgage of his cotton crop for the then current year as security for the supplies so furnished "to enable him (McCain) to make said crop." The crop was not then sown. This case cites many of the above authorities, and others. It recognizes that there is a seeming conflict in the adjudged cases upon the subject, but sustains the validity of the mortgage. It is there said: "The right in the proprietor of the soil to plant, cultivate, and gather his crops, to the exclusion of all others, is an absolute legal right, and an incorporeal property, and incorporeal property is as well the subject of valid sale and mortgage as any other kind of property. The mortgagor, in this case, was the proprietor of the land on which he proposed to raise the crop in controversy. The crop had a potential existence, because it was to be the natural product and expected increase of the land then owned and occupied by him." The like contract was sustained in *Butt v. Ellett*, 19

Wall, 544. This doctrine is also sustained by the following authorities: *Arques v. Was-son*, 51 Cal. 620; *Conderman v. Smith*, 41 Barb. 404; *Van Hoozer v. Cory*, 34 Barb. 10; *Senter v. Mitchell*, 16 Fed. Rep. 206. In *Robbins v. McKnight*, 5 N. J. Eq. 642, the contract was in all essential features identical with the one here involved, and it was sustained by the court. In the present case the trees were in existence at the time of the contract, were transferred to and became the property of Schultz, the vendee, subject to a share of the crops for the years specified; the contract was executed by the plaintiffs, and operated to the great benefit of Schultz and his grantee, the defendant. This contract is one that the law ought to delight in sustaining. If it cannot be sustained, then no executed contract can be, where a party furnishes seed, and puts in the crop upon shares. The same reason that would defeat the right to recovery for the crop of peaches in this case would defeat the right to recover a crop of corn, wheat, or other grain, or strawberries and other fruits

of like character. The defendant purchased with notice, and the purchase price was reduced on account of the plaintiffs' rights in the crop. We think that under the authorities above cited, as well as in reason and justice, plaintiffs and Schultz became tenants in common of the peaches for the years which they should select, and that defendant, having purchased with notice, stood in the same relation to plaintiffs that did his grantor. Defendant's counsel cite *Bates v. Smith*, 83 Mich. 347, 47 N. W. Rep. 249, and insist that it controls this case in their favor. The language of that case is broad, and, if strictly followed, would seem to include the present one; but we think the authorities above cited make a clear distinction between the natural products of the soil, wool from sheep, milk from cows, and the like, from the case that was then under consideration, and we are disposed to follow them. The language of that case must be construed in connection with its facts. Judgment affirmed. The other justices concurred.

SENTER et al. v. MITCHELL.

(16 Fed. 203.)

Circuit Court, E. D. Arkansas. April Term, 1883.

Smoot & McRae and U. M. & G. B. Rose, for plaintiffs. W. G. Whipple, for defendant.

CALDWELL, J. On the 15th day of November, 1881, the defendant, Austin Mitchell, was indebted to Milner & Collins in the sum of \$1,767.69, evidenced by a negotiable promissory note of that date, and, to secure payment of the same executed a mortgage on that day on certain real estate and "30 bales of good lint cotton, the first picking of our crop of 1882, to average 450 pounds each, to be delivered in Prescott, Nevada county, Arkansas, on or before the 1st day of November, 1882."

On the 19th of December, 1881, Milner & Collins indorsed the note, and transferred the mortgage to the plaintiffs. The defendant did not deliver the cotton at the time and place appointed in the mortgage, and asked and obtained an extension of time for that purpose. He failed a second and third time to deliver the cotton as he had promised and agreed to do. Each time he gave some plausible excuse for his default, and continued thus to beguile the plaintiffs until he had gathered, baled, and sold his whole cotton crop. During this time he also sold all his other property of any value liable to seizure for debt, except the real estate embraced in the mortgage. After selling the cotton covered by the plaintiffs' mortgage, he admitted he had the proceeds, amounting to \$800, but declined to pay the same, or any part of it, to the plaintiffs unless they would release the mortgage on the real estate. No part of the plaintiffs' debt has been paid, the real estate mentioned in the mortgage is worth less than half the plaintiffs' debt, and the defendant is now insolvent. The plaintiffs sued out an attachment, which the defendant traversed.

The defendant's conduct is attempted to be justified on two grounds: (1) That the mortgage on the cotton was void for uncertainty in the description; and (2) that the note and mortgage were procured from him by fraud, and are without consideration.

Under the act of February 11, 1875, a mortgage on crops to be grown is valid, and the lien attaches when the crop is produced. If it be conceded that the description of the cotton in the mortgage is too uncertain to bind third parties, it was undoubtedly good between the mortgagor and mortgagee. *McChure v. McDearmon*, 26 Ark. 66; *Person v. Wright*, 35 Ark. 169. But the description would seem to be sufficient for all purposes. "That hath certainty enough which may be made certain." The description is "30 bales of good lint cotton, the first picking of our crop of 1882, to average 450 pounds each."

There is no difficulty here in identifying the particular bales covered by the mortgage; they are the first 30 picked and baled of the mortgagor's crop of 1882. These bales were capable of identification by the fact that they were the first baled of the crop of that year; and the lien of the mortgage fastened upon them as soon as the process of baling was completed. *Robinson v. Mandlin*, 11 Ala. 977; *Stearns v. Gafford*, 56 Ala. 544. In the last case cited the court says:

"In the case of *Robinson v. Mandlin*, 11 Ala. 977, the grantor, who was a planter, was indebted to his commission merchants, and, to secure them, conveyed to a trustee by trust deed 50,000 pounds of the first picking of the crop of 1842, then growing on his plantation, to be neatly ginned and picked in bales, ready for market; and upon the failure of the planter to pay the note at maturity, the trustee was authorized to take said 50,000 pounds of cotton and ship the same to the commission merchants, to be sold for the payment of the note," etc. The question was whether the trust deed conveyed the title of the cotton, so as to place it beyond the lien of an execution. It was decided that it did; the court holding that the terms "first cotton which may be gathered," means of the early, in contradistinction to the late gathering; and, therefore, when 91 bales of the early gathering were ginned and baled, the lien attached, although there was then in the crude state a quantity of cotton, not separated from the seed, gathered earlier in the season than that which composed the 91 bales. The proof in this case tends to show that the cotton in controversy may justly be classed as "of the first cotton that may be gathered," under the ruling in the case from which we have quoted."

On this question the case of *Person v. Wright*, *supra*, is not in point. In that case the description was an interest in the mortgagor's crop "to the extent of one 500-pound bale." No clue was given by which the bale could be identified and the court properly held that "until separation or designation of the particular property, no action of replevin could be maintained."

The defendant has failed utterly to show fraud or want of consideration. The evidence establishes, beyond controversy, that the note and mortgage were given for a full and valuable consideration. Upon the proofs it is clear that the defendant disposed of his property, the cotton particularly, to hinder and delay the plaintiffs in the collection of their debt. The defendant does not feel that he was guilty of any moral fraud. He justifies his act to his own conscience upon grounds which the court finds either had no existence in fact, or constitute no legal justification. Whatever his motive may have been, it is clear he intended, by the disposition he made of his property, to hinder and delay his creditors in the collection of their debt. This finding supports the attachment.

The defendant has been summoned and examined under section 415 of Gantt's Digest. That section reads as follows:

"Sec. 415. When it appears by the affidavit of the plaintiff, or by the return of an officer to an order of attachment, that no property is known to the plaintiff or the officer on which the order of attachment can be executed, or not enough to satisfy the plaintiff's claim, the defendant may be required by the court to attend before it, and give information on oath respecting his property; and where it also appears by the affidavit of the plaintiff that some person other than the defendant has in his possession property of the defendant, or evidences of debt, such person may also be required by the court to attend before it, and give information on oath respecting the same."

He admits that he has in his possession and control the proceeds of the sale of the 30 bales of cotton, amounting to \$800. The plaintiffs have filed a motion for a rule on the defendant to pay this money to the marshal or into the registry of the court. This motion is resisted on the ground that the court has no power or jurisdiction to make such an order.

It is vain for the statute to provide that the defendant may be required to attend before the court, "and give information on oath respecting his property," if after giving such information the court is powerless to act upon it, and require the defendant to do what is plainly and obviously his legal duty. The authority to compel the discovery necessarily implies the power to render the discovery effectual. It is a settled canon of construction that what is implied in a statute is as much a part of it as what is expressed.

Suppose a defendant to answer that he has 10 horses concealed within the jurisdiction of the court, and refuses to give information which will enable an officer to find them. May he not be committed until he does so? Unless the court has this power, the statute is nugatory. Money is property, and in proceedings under this section there is no distinction between it and other kinds of property. The popular notion that a debtor can put his money in his pocket and admit that it is there and continue to defy his creditors, is not the law in this state. In cases of attachment he can be reached by proceedings under section 415, and after judgment he can be reached by proceedings had under sections 2713-2717. Where the discovery is made after judgment, section 2717 provides that—

"The court shall enforce the surrender of the money or security therefor, or of any other property of the defendant in the execution which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender, until it shall be done, or the court is satisfied that it is out of his power to do so."

The court possesses the like powers when the discovery is made by an examination had under section 415. The proceedings in both instances are analogous to the recognized practice in chancery cases and in bankruptcy.

The sacredness of the defendant's person is not violated, nor is he imprisoned for debt. He is simply required to do that which, upon his own admission under oath, it is his legal duty to do, and which he admits it is in his power to do. When committed for refusing to obey such an order, it is in no sense a commitment for debt. It is a commitment as a punishment for contempt in refusing to obey a valid order of the court. The jurisdiction to commit for such cause is inherent in every court, whether of law or equity. To say that a defendant in an attachment, who admits on his examination on oath that he has in his possession and control money or other property liable to seizure to satisfy the writ, cannot be required to place such means within the grasp of the law, or that obedience to such an order may not be enforced by the usual methods by which courts enforce obedience to their lawful commands, is to grant an immunity to dishonest debtors, as shocking to our sense of justice as was the imprisonment of honest men for not paying debts which they had no means to pay.

Imprisonment for debt is abolished, but the laws authorizing the seizure of the debtor's property and its application to the payment of his debts remain, as do the old as well as the new remedies given to creditors to discover property for this purpose. The examination of the defendant in attachment is to effectuate this object, and for no other purpose. But the constitution of this state does not exempt from imprisonment for debt "in cases of fraud," Article 2, § 16, Const. It would be difficult to imagine a clearer case of fraud than for a debtor to admit under oath that he had money and property to pay his debts, and at the same time refuse to surrender it for that purpose.

Suitors in this court are entitled to have enforced in their favor all the remedies supplementary to and in aid of writs of attachment and execution authorized by the state law, and the proceedings for that purpose may be at law or in equity, according as the state statute provides.

The case of *Ex parte Boyd*, 105 U. S. 647, arose under an analogous statute in the state of New York. In that case, Boyd, against whom an execution had been issued, was ordered to submit to an examination before a commissioner of the court concerning his property. He refused to take an oath to testify under said order, whereupon he was attached and committed for contempt by the circuit court. He thereupon filed in the supreme court of the United States a petition for a writ of habeas corpus, which, upon a very full consideration of the case, was denied.

The following extract from the opinion shows that the examination of a debtor with the view to the discovery of assets is not a novel or unusual, nor necessarily an equitable, proceeding:

"There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate as a proceeding at law, under the orders of the court, where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equi-

ty. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located by legislative authority to meet the requirements of judicial convenience. Whatever logical or historical distinctions separate the jurisdictions of equity and law, and with whatever effect these distinctions may be supposed to be recognized in the constitution, we are not of opinion that the proceeding in question partakes so exclusively of the nature of either that it may not be authorized, indifferently, as an instrument of justice in the hands of courts of whatever description."

An order will be entered requiring the defendant to pay into the registry of the court, within 10 days after service of the order, the \$800 cash which he admits he has in his possession and control, to abide the further order of the court in the premises.

HULL v. HULL.

(48 Conn. 250.)

Supreme Court of Connecticut. June Term, 1880.

W. K. Townsend and J. H. Whiting, in support of the motions. H. B. Munson, contra.

LOOMIS, J. The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm, in this state, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff. No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm, on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin. The sole ground upon which the defendant claims to hold these colts is that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error. The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist, nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this state and elsewhere abundantly supply it. *Lucas v. Birdsey*, 11 Conn. 357; *Capron v. Porter*, 43 Conn. 389; *Spring v. Chipman*, 6 Vt. 662. In *Bellows v. Wells*, 36 Vt. 539, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff. In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible

change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, *partus sequitur ventrem*, applies. We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear. It is true, as remarked in *Perkins, Cony. tit. "Grant," § 65*, that "it is a common learning in the law that a man cannot grant or charge that which he has not"; yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property or interest, may be the subject of a valid present sale. The distinction is illustrated in *Hobart, 132*, as follows: "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void." It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 *Pars. Cont.* (5th Ed.) p. 523, note k, and cases there cited; *Hill, Sales*, § 18; *Story, Sales*, § 186. In *Fonville v. Casey*, 1 *Murph. (N. C.)* 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in *McCarty v. Blevins*, 5 *Yerg.* 195, it was held that where A. agrees with B. that the foal of A.'s mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born sold and delivered it to D.

Before resting the discussion as to the plaintiff's title, we ought perhaps briefly to allude to a claim made by the defendant, both in the court below and in this court, to the effect that if the plaintiff's title be conceded she is estopped from asserting her claim. This doctrine of estoppel, as all triers must have observed, is often strangely misapplied. And it is surely so in this instance. The case fails to show any act or omission on the part of the plaintiff inconsistent with the claims she now makes, or that the creditors of Murray or the defendant as representing them were ever misled to their injury by any act or negligence on her part. On the contrary the estoppel is asserted in the face of the explicit finding, that "as soon as the plaintiff became aware of the attachment of her horses she forbade the officer taking the same, and demanded their immediate return to her." The only fact which is suggested as furnishing the basis for the

alleged estoppel is that from the 1st of August, 1879, to the 12th of January next following, "no attempt was made by the plaintiff to maintain her title by suit, although she was living during the time at Guilford, where said colts were." But who ever heard of an estoppel in an action at law predicated solely on neglect to bring a suit for the period of five months? To recognize such a thing for any period short of the statute of limitations would practically modify the statute and create a new limitation. Furthermore, in what respect have the defendant and those he represents been misled to their injury by this fact? The plaintiff never induced the taking or withholding of her property. And can a tortfeasor or the wrongful possessor of another's property object to the delay in suing him for his wrong, and claim, as in this case, an estoppel on the ground that his wrongful possession proved a very expensive one to him, amounting even to more than the value of the prop-

erty? He might have stopped the expense at any time by simply giving to the plaintiff what belonged to her.

The single question of evidence which the record presents we do not deem it necessary particularly to discuss. It will suffice to remark that if the defendant's testimony was admissible to show that Murray, after the sale to the plaintiff (and, so far as appears, in her absence), claimed to own the mares and colts, it was a complete and satisfactory reply for the plaintiff in rebuttal to show that Murray's own entries (presumably a part of the register in the appropriate books kept by him, showed the fact to be otherwise, and in accordance with the plaintiff's claims. At any rate it is very clear that no injustice was done by this ruling to furnish any ground for a new trial. There was no error in the judgment complained of, and a new trial is not advised. In this opinion the other judges concurred.

SANBORN v. SHIPHERD.

(60 N. W. 1089, 59 Minn. 144.)

Supreme Court of Minnesota. Nov. 16, 1894.

Appeal from municipal court of Minneapolis; Andrew Holt, Judge.

Action by Colby E. Sanborn against Edward L. Shipherd to recover possession of certain personal property. From a judgment for plaintiff, defendant appeals. Reversed.

W. H. Adams, for appellant. George S. Grimes, for respondent.

MITCHELL, J. This was an action to recover the possession of certain personal property alleged to have been wrongfully detained by defendant. The undisputed evidence is that the parties entered into a contract for the sale of the property by defendant to plaintiff for \$200, of which the plaintiff paid \$2.50 at the date of the contract, and was to pay the balance of \$197.50 on the evening of the same day; that upon the return of plaintiff he demanded the delivery of the property without paying the \$197.50, on the ground that in the meantime he had been garnished. The defendant offered to deliver the property on payment of the \$197.50, but refused to do so without it; hence this action. The \$197.50 never has been paid or tendered. Nothing was said in the contract of sale as to its being on cred-

it, and there was nothing from which a credit could be implied. There may, perhaps, be some conflict of evidence as to whether defendant was himself the owner or merely the agent of the owner of the property, having charge of it with authority to sell; but which he was is wholly immaterial in this case. How, on this state of facts, it could be found that plaintiff was entitled to the possession of the property we are wholly at a loss to conceive. There being no agreement of the parties to the contrary, the law presumes the sale to have been for cash; and, upon a sale for cash, payment of the purchase money and the delivery of the property are concurrent and mutually dependent acts. Neither party is bound to perform without contemporaneous performance by the other. The payment of the purchase money was a condition precedent to plaintiff's right of possession. The fact that some third party had attempted to garnish the purchase money in the hands of the plaintiff could not alter the contract of the parties. We do not mean to be understood as intimating that, in the case of an executory contract for the sale of personal property, replevin will lie where the purchase money has been tendered, but refused. But in this case there was not even a tender. Judgment reversed and new trial ordered.

GILFILLAN, C. J., absent on account of sickness; took no part.

KOUNTZ v. KIRKPATRICK et al.

(72 Pa. St. 376.)

Supreme Court of Pennsylvania. Jan. 6, 1873.

Assumpsit by Joseph Kirkpatrick and James Lyons, trading as Kirkpatrick & Lyons, to the use of Frederick Fisher and others, trading as Fisher Bros., against William J. Kountz, for failure to deliver a certain quantity of crude petroleum, when called upon to do so December 31, 1869, in compliance with his contract previously made. Judgment for plaintiffs, and defendant brings error. Reversed.

Before THOMPSON, C. J., and READ, AGNEW, SHARSWOOD, and WILLIAMS, J.

S. H. Geyer and G. Shiras, Jr., for plaintiff in error. M. W. Acheson, for defendants in error.

AGNEW, J. The second, third, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth errors are not well assigned, for all the answers of the court to the points were omitted. When a court simply refuses a point, the error is well assigned by reciting the point, and stating that it was refused. But when the judge answers specially, in order to introduce a qualification he deems necessary to make his instruction correct, the answer must be recited as well as the point. We shall not decline considering, however, all the important questions; and in order to discuss them, we may state succinctly the nature of the case. On the 7th of June, 1869, Kountz sold to Kirkpatrick & Lyons, two thousand barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st of December, 1869, for cash on delivery, at thirteen and a half cents a gallon. On the 24th of June, 1869, Kirkpatrick & Lyons assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyons, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil, and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts, to pay a heavy difference for non-delivery. Fisher & Brothers, the assignees of Kountz's contract, were not in the combination, and the principal questions are whether they are affected by the acts of Kirkpatrick & Lyons, subsequent to the assignment; whether notice of the assignment to Kountz was necessary to protect them, and what is the true measure of damages. The court below held that Fisher & Brothers, as assignees of the contract, were not affected by the acts of Kirkpatrick & Lyons, as members of the combination in the following October and subsequently, and that notice in this case was not essential to the protection of Kountz.

The common-law rule as to the assignability of choses in action no longer prevails, but in equity the assignee is looked upon as the true owner of the chose. He may set off the

demand as his own: *Morgan v. Bank*, 8 Serg. & R. 73; *Rumsey's Appeal*, 2 Watts, 228. The assignee takes the chose subject to the existing equities between the original parties before assignment, and also to payment and other defences to the instrument itself, after the assignment and before notice of it; but he cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract: *Davis v. Barr*, 9 Serg. & R. 137; *Beckley v. Eckert*, 3 Pa. St. 292; *Mott v. Clark*, 9 Pa. St. 339; *Taylor v. Gitt*, 10 Pa. St. 428; *Bank v. Balliet*, 8 Watts & S. 318; *Corser v. Craig*, 1 Wash. C. C. 421, Fed. Cas. No. 3,255; 1 Paus. Cont. 193, 196; 2 Story, Cont. § 396, note.

The act of Kirkpatrick & Lyons, complained of as members of an unlawful combination to raise the price of oil, was long subsequent to their assignment of Kountz's contract, and was a mere tort. The contract was affected only by its results as an independent act. It does not seem just, therefore, to visit this effect upon Fisher & Brothers, the antecedent assignees. The act is wholly collateral to the ownership of the chose itself, and there is nothing to link it to the chose, so as to bind the assignors and assignees together. After the assignment, there being no guaranty, the assignors had no interest in the performance of this particular contract, and no motive, therefore, arising out of it to raise the price on Kountz. The acts of Kirkpatrick & Lyons seem, therefore, to have no greater or other bearing on this contract than the acts of any other members of the combination, who were strangers to the contract.

In regard to notice of the assignment to Kountz, it is argued, that having had no notice of it, if he knew of the conspiracy to raise the price of oil, and thus to affect his contract, and that Kirkpatrick & Lyons were parties to it, he might have relied on that fact as a defence, and refused to deliver the oil, and claimed on the trial a verdict for merely nominal damages for his breach of his contract. Possibly in such a special case, want of notice might have constituted an equity, but the answer to this case is, that no such point was made in the court below, and there does not seem to be any evidence that Kountz knew of the conspiracy, and Kirkpatrick & Lyons's privity, and relying on these facts, desisted from purchasing oil to fulfil his contract with them. As the case stood before the court below, we discover no error in the answers of the learned judge on this part of it.

The next question is upon the proper measure of damages. In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent prac-

tices, it is necessary to fix the true meaning of the rule itself, before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of "value" is worth, and this worth is made up of the useful or estimable qualities of the thing: See Webster's and Worcester's Dictionaries. "Price," on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it: *Id.* Value and price are, therefore, not synonymes, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase market value, not market price. Mr. Sedgwick, in his standard work on the Measure of Damages (4th Ed. p. 260) says: "Where contracts for the value of chattels are broken by the vendors failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered upon the ground; that this is the plaintiff's real loss, and that with this sum, he can go into the market and supply himself with the same article from another vendor." Judge Rogers uses the same term in *Smethurst v. Woolston*, 5 Watts & S. 109: "The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said C. J. Tilghman, in *Girard v. Taggart*, 5 Serg. & R. 32. Judge Sergeant, also, in *O'Connor v. Forster*, 10 Watts, 422, and in *Mott v. Danforth*, 6 Watts, 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is therefore proper to inquire into the true legal idea of damages in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice or negligence enter into the question, "the declared object (says Mr. Sedgwick, in his work on Damages) is to give compensation to the party injured for the actual loss sustained." (4th Ed.) pages 28, 29; also, pages 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in *Bussy v. Donaldson*, 4 Dall. 206, "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said C. J. Gibson, "is to give actual compensation, by graduating the amount of the damages ex-

actly to the extent of the loss." "The measure is the actual, not the speculative loss:" *Forsyth v. Palmer*, 14 Pa. St. 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end.

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C. J., in *Bank v. Reese*, 26 Pa. St. 146. "The paramount rule in assessing damages (he says), is that every person unjustly deprived of his rights, should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then before Judge Lewis is equally true—that is to say—when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept: *Andrews v. Hoover*, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value

of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in *Girard v. Taggart*, to be the only one. On the contrary, the propriety of the direction there that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in *Trout v. Kennedy*, 47 Pa. St. 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price—neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own state, bearing strongly on this point: *Blydenburgh v. Welsh*, Baldw. 331, Fed. Cas. No. 1,583. Judge Baldwin had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a fixed price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price—the market price—of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their

sales or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for nonfulfillment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to take as that price whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining," says an eminent writer on contracts, "what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury." 2 Pars. Cont. (Ed. 1857) p. 482. In *Smith v. Griffith*, 3 Hill, 337, 338, C. J. Nelson said: "I admit that a mere speculative price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief Justice Gibson, upon stock-jobbing contracts (*Wilson v. Davis*, 5 Watts & S.

523). "To have stipulated," says he, "for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering; in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties dealt upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December, 1869, as demanded by the defendant in his fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October 1869, a number of persons of large capital, and among them Kirkpatrick & Lyons, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit, that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: "It was our purpose to take the oil, pay for it, and keep it until January 1st 1870, otherwise we would have been heading the market on ourselves." Mr. Long says that on the 3d of January 1870 he sold oil to Fisher & Brothers (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price.

Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December 1869 than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st January 1870, except that the so-called combination ceased to buy at the last of December 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December 1869 was not a fictitious, unnatural, inflated and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about sixty dollars each, were by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollars a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defence, on which the learned judge in a great measure rules the question of damages, will be expressed in the case of *Kountz v. Oil Refining Co.* [72 Pa. St. 392] in an opinion to be read immediately.

Judgment reversed, and a venire facias de novo awarded.

McCONNELL v. HUGHES.

(29 Wis. 537.)

Supreme Court of Wisconsin. Jan. Term, 1872.

Appeal from circuit court, Green Lake county.

Ryan & Kimball, for appellant. A. B. Hamilton and Butler & Winkler, for respondent.

LYON, J. The bill of exceptions does not purport to contain all of the evidence.

We cannot, therefore, review the evidence, but must presume that it sustains the findings of fact by the circuit court. That court having found that the material allegations of the complaint were proved, it follows that if the complaint states a valid cause of action, the plaintiff was entitled to judgment.

We think that the complaint does state a valid cause of action. It avers that an executory contract for the sale and purchase of wheat was made by the parties, and that, in pursuance thereof, the plaintiff delivered to the defendants, and the defendants accepted and received the wheat. It must be true that by such delivery and acceptance the title to the wheat became vested in the defendants, and the right to have the price therefor, when the same should be determined as provided in the contract, in like manner became vested in the plaintiff.

But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.

The contract furnishes a criterion for ascertaining the price of wheat; leaving nothing

in relation thereto for further negotiation between the parties. This is all that the law requires. Story, Sales, § 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge Story, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point.

It is further argued that, after a valid sale and before payment of the price, there must be a debt owing by the vendee to the vendor, while in this case, until the price of the wheat was ascertained, there was no indebtedness. The latter part of this proposition is erroneous. As soon as the wheat was delivered, the defendants owed the plaintiff therefor. There was therefore a debt, but the amount thereof was not ascertained. It remained unliquidated until the price of the wheat was determined.

The objections that the assessor could not list the claim for the price of the wheat for taxation, and that the same could not be reached by garnishee process at the suit of a creditor of the plaintiff, while such price remained undetermined, present no practical difficulties. The assessor would fix the value of the demand according to his best judgment as in other cases of the valuation of property and credits; and the creditor in the garnishee proceeding would probably be subrogated to the rights of the plaintiff in respect to determining the contract price for the wheat.

BY THE COURT. The judgment of the circuit court is affirmed.

WOOD v. BOYNTON et al.

(25 N. W. Rep. 42, 64 Wis. 265.)

Supreme Court of Wisconsin. Oct. 13, 1885.

Appeal from circuit court, Milwaukee county.

Johnson, Rietbrock & Halsey, for appellant. N. S. Murphey, for respondents.

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of \$1,000. The case was tried in the circuit court, and after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court. The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about \$700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; * * * this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the twenty-eighth of December, I needed money

pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar,' and he stepped to the change drawer and gave me the dollar, and I went out." In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg,—worn pointed at one end; it was nearly straw color,—a little darker." She also testified that before this action was commenced she tendered the defendants \$1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing, upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money with interest, and a demand of a return of the stone to her. Unless such tender and demand re-vested the title in the appellant, she cannot maintain her action. The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so re-vest the title in her. The only reasons we know of for rescinding a sale and re-vesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the

sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580. There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. *Kennedy v. Panama, etc., Mail Co.*, supra, 587; *Street v. Blay*, 2 Barn. & Adol. 456; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Gurney v. Womersley*, 4 El. & Bl. 133; *Ship's Case*, 2 De G., J. & S. 544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See *Street v. Blay*, supra.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made. When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See *Stettheimer v. Killip*, 75 N. Y. 287; *Etting v. Bank of U. S.*, 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. *Wheat v. Cross*, 31 Md. 99; *Lambert v. Heath*, 15 Mees. & W. 487; *Bryant v. Pember*, 45 Vt. 487; *Kuelkaup v. Hidding*, 31 Wis. 503-511. However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.

HUTHMACHER v. HARRIS' ADM'RS.

(38 Pa. St. 491.)

Supreme Court of Pennsylvania, March 25, 1861.

Trover by Rosanna Gardner, administratrix, and Silas Sutton and Peter H. Scovill, administrators of Elisha Harris, deceased, against David M. Huthmacher. Judgment for plaintiffs, and defendant brings error. Affirmed.

The property in controversy, consisting of promissory notes and two watches, was found by defendant in a square block of wood, on the top of which was a horizontal wheel with a perpendicular iron spindle, called in the vendue list a "drill machine," which was bought by him at a sale of the effects of the said Harris.

Hendrick B. Wright, for plaintiff in error.
E. L. Dana, for defendants in error.

WOODWARD, J. The ground on which we affirm this judgment is, that there was no sale of the valuables contained in the block of wood, which is called, in virtue of its horizontal wheel and upright spindle, "a drill machine." Sale, said Mr. Justice Wayne, in *Williamson v. Berry*, 8 How. 544, is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold.

That no such contract was made by these parties in respect to the contents of the drill machine, we deduce from the agreed facts of the case. The machine itself, and every essential part and constituent element of it, were well sold. The consideration paid, though only fifteen cents, was in law a quid pro quo, and the sale, unaffected by fraud or misrepresentation, passed to the purchaser an indefeasible right to the machine and all the uses and purposes to which it could be applied. But the contents of the machine are to be distinguished from its constituent parts. They were unknown to the administrators, were not inventoried, were not exposed to auction, were not sold. Of course they were not bought. All that was sold was fairly bought, and may be held by the purchasers. The title to what was not sold remains unchanged. A sale of a coat does not give title to the pocket-book which may happen to be temporarily deposited in it, nor the sale of a chest of drawers a title to the deposits therein. In these cases, and many others that are easily imagined, the contents are not essential to the existence or usefulness of the thing contracted for, and not being within the contemplation or intention of the contracting parties, do not pass by the sale. The contract of sale, like all other contracts, is to be controlled by the clearly ascertained intention of the parties.

The argument proceeded very much on the doctrine that equity will, in certain cases, relieve against mistakes of fact as well as of law; but if there was no contract of sale,

there could be no mistake of fact to vitiate it, and therefore that doctrine has no possible application. Mistake is sometimes a ground of relief in equity; but a man who puts up his wares at auction and sells them to the highest bidder, has no right to relief on the ground that he was ignorant of the value of that which he sold. Such a mistake comes of his own negligence, for it is his duty to possess all necessary knowledge of the value of that which he brings to market, and the rule is general that if a party becomes remediless at law by his own negligence, equity will leave him to bear the consequences.

Nor could these administrators, had they sold the contents, have pleaded, in addition to their ignorance, their fiduciary character, and their possible liability for a devastavit, in defeat of the vested rights of the purchaser; for, in respect to the personality of the decedent, they stood in the dead man's shoes, and were in fact, as they are commonly called in law, his personal representatives. The law cast the personal estate upon them for purposes of administration, and a fair sale made in pursuit of that purpose, would confer as perfect a title as if made by a living owner. They, no more than any other vendor, could set aside such a sale to avert the consequences of their own negligence.

But inasmuch as they did not, in point of fact, sell the valuables which are in dispute, these principles, and all the arguments drawn from the law of mistake, are outside of the case.

If, then, there was no sale and purchase of the contents of the block or machine, how did Huthmacher, when he discovered his unsuspected wealth, hold it? Evidently as treasure trove, which, though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when they are found hidden with both of these precious metals. And it is not necessary that the hiding should be in the ground, for we are told in 3 Inst. 132, that it is not "material whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins or otherwise."

The certain rule of the common law, in regard to treasure trove, as laid down by Bracton, lib. 3, c. 3, and as quoted in Viner's *Abridgement*, is, "that he to whom the property is, shall have treasure trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the king unless when no one knows who hid that treasure." The civil law gave it to the finder, according to the law of nature, and we suppose it was this principle of natural law that was referred to in what was said of treasure hid in a field in Matthew's Gospel, xiii. 44.

But the common law, which we administer, gave it always to the owner if he could be found, and if he could not be, then to the king, as wrecks, strays, and other goods are

given, "whereof no person can claim property." 3 Inst. 132. Huthmacher, therefore, held the unsold valuables for the personal representatives of the deceased owner.

Several sporadic cases, some of which were highly apocryphal, were mentioned in the argu-

ment as affording analogies more or less appropriate to this case, but it is quite unnecessary to discuss them, because if they touch, they do not encumber the clear ground whereon, as above indicated, we rest our judgment.

The judgment is affirmed.

SHERWOOD v. WALKER et al.¹

(33 N. W. 919, 66 Mich. 568.)

Supreme Court of Michigan. July 7, 1887.

Error to circuit court, Wayne county; Jenkinson, Judge.

C. J. Reilly, for plaintiff. Wm. Aikman, Jr., (D. C. Holbrook, of counsel,) for defendants and appellants.

MORSE, J. Replevin for a cow. Suit commenced in justice's court; judgment for plaintiff; appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out 25 assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff. The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle. The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed. May 5, 1886, plaintiff went out to Greenfield, and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter: "Walkerville, May 15, 1886. T. C. Sherwood, President, etc.—Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer. Yours, truly, Hiram Walker &

Sons." The order upon Graham inclosed in the letter read as follows: "Walkerville, May 15, 1886. George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with the cow, and have her weighed. Yours, truly, Hiram Walker & Sons." On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, \$80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit. After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken. The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost \$850, and if not barren would be worth from \$750 to \$1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following. On the nineteenth of May, the plaintiff wrote Graham as follows: "Plymouth, May 19, 1886. Mr. George Graham, Greenfield—Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning. Yours, etc., T. C. Sherwood." Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of

¹ Dissenting opinion of Sherwood, J., omitted.

their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy, at \$90, and Rose 2d at \$80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order. If they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover. The defendants submitted a number of requests which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over \$50, the contract of sale, in order to be valid, must be one where the purchaser has received or ac-

cepted a part of the goods, or given something in earnest, or in part payment, or where the seller has signed some note or memorandum in writing. How. St. § 6186. Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yards, or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yards. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff. Payment was not to be a concurrent act with the delivery, and therein this case differs from *Case v. Dewey*, 55 Mich. 116, 20 N. W. 817, and 21 N. W. 911. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him. Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter

and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff. I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence or any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when she was weighed, if the same was done upon correct scales, and by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of the title. The order to Graham is to deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: *Lingham v. Eggleston*, 27 Mich. 324; *Wilkinson v. Holiday*, 33 Mich. 386; *Grant v. Merchants' & Manufacturers' Bank*, 35 Mich. 527; *Carpenter v. Graham*, 42 Mich. 194, 3 N. W. 974; *Brewer v. Salt Ass'n*, 47 Mich. 534, 11 N. W. 370; *Whitecomb v. Whitney*, 24 Mich. 486; *Byles v. Collier*, 54 Mich. 1, 19 N. W. 565; *Scotten v. Sutter*, 37 Mich. 527, 532; *Ducey Lumber Co. v. Lane*, 58 Mich. 520, 525, 25 N. W. 568; *Jenkinson v. Monroe*, 61 Mich. 454, 28 N. W. 663.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared

with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,—such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; *Leake, Cont.* 339; *Story, Sales*, (4th Ed.) §§ 377, 148. See, also, *Cutts v. Guild*, 57 N. Y. 229; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen, 492, 12 Allen, 44; *Huthmacher v. Harris' Adm'rs*, 38 Pa. St. 491; *Byers v. Chapin*, 28 Ohio St. 300; *Gibson v. Pelkie*, 37 Mich. 380, and cases cited; *Allen v. Hammond*, 11 Pet. 63-71.

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold,—then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580, 587. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$750;

if barren, she was worth not over \$80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake

affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

CAMPBELL, C. J., and CHAMPLIN, J., concurred.

SHERWOOD, J., delivered a dissenting opinion.

RODLIFF et al. v. DALLINGER.

(4 N. E. 805, 141 Mass. 1.)

Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 11, 1886.

Exceptions from superior court, Suffolk county; Knowlton, Judge.

This was an action of replevin to recover possession of 20 bags of California wool. The plaintiffs were wool dealers in Boston, and on or about November 15, 1882, delivered said wool to one Henry Clementson, a wool dealer and broker in Boston. The defendant was a public warehouseman in Boston, and received the wool on storage from Clementson about November 15, 1882, not knowing where he obtained it, and issued a warehouse receipt for the same on the day after the delivery of the wool. Clementson applied to the Massachusetts Loan & Trust Company, of Boston, for a loan of \$2,000 on the wool in the warehouse, and, after an examination of the article, the loan was made; the trust company taking the warehouse receipt from Clementson, having no knowledge where Clementson obtained the wool, his statement being that he purchased the wool to sell; and the trust company, being the real party in interest, defended the suit.

Upon the foregoing facts the court instructed the jury that there were three possible views of the transaction: (1) That they might find it was an ordinary sale to Clementson; or (2) that it was not a sale to Clementson, but was a delivery to Clementson as a broker, with a view to his selling it to some customer, whom he expected afterwards to negotiate with, and with whom to consummate a sale; and if they found this, then there was a special provision of the statute which protects parties dealing in good faith with a broker having property in that way, so far as they make advances or loans upon property in pledge, in good faith, to persons who have custody of property as brokers, with authority to sell or dispose of it; or (3) that it was not a sale to Clementson, or a delivery to him as broker with authority to sell, but that it was a delivery to Clementson upon his representation that he came from a purchaser representing him, with an offer for it,—a purchaser he did not disclose,—and that these goods were delivered to him as the agent of that purchaser,—as a sale to that purchaser; and if that was the fact, that the plaintiffs were entitled to the property, notwithstanding it was subsequently pledged to the Massachusetts Loan & Trust Company.

The court also further instructed the jury upon the third view "that if this was a transfer upon a false representation made by Clementson,—a representation that he came with an offer from a third person whose name he did not wish to disclose,—and the goods were delivered to Clementson as a sale to him as the agent of this third person, whose offer he was bearing, with the view that the property should pass at the time to that third person, and thus constitute a sale to that third person, from whom payment was to be made subsequently,

and the payment to be brought back by Clementson as the agent of that third person, that Clementson had no right afterwards to deal with that property at all. He got it into his possession by fraud, and he got it into his possession without any authority to make any subsequent sale or to do anything with it. It was wrongly in his possession from the start, and any person who saw fit to advance money upon it or to buy it, however honestly, and in perfect good faith, would be the loser, and plaintiffs could pursue the property, and get it wherever they could find it, whenever the fraud practiced upon them should come to their knowledge."

Upon the foregoing facts and rulings, the jury found for the plaintiffs, and the defendant, having duly excepted to the third instruction of the court, being so much of the judge's rulings as authorized the jury to find for the plaintiffs, prays that these his exceptions to said rulings may be allowed.

Alfred Hemenway, for plaintiffs. Henry D. Hyde, for defendant.

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. *Com. v. Jeffries*, 7 Allen, 548, 564. It was admitted that Clementson in fact was not acting for such an undisclosed principal, and it follows that, if the plaintiffs' evidence was believed, there was no sale. There could not be one to the supposed principal, because there was no such person; and there was not one to Clementson, because none purported to be made to him; but, on the contrary, such a sale was expressly refused, and excluded. *Edmunds v. Transportation Co.*, 135 Mass. 283.

It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason, in Clementson's representations, for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party, and if the jury find that such a sale was the only one that purported to have been made, the fact that it failed does not turn it into a sale to the party conducting the transaction.

Schnaltz v. Avery, 16 Q. B. 655, only decided that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does not hint that the agent could not be excluded by express terms,

or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less, that, in favor of third persons, the agent would be presumed, without evidence, to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as, when a vendee expressly or impliedly represents that he is solvent, and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses, and dealt with as the person so identified, says that

he is A, when in fact he is B. But when one of the formal constituents of illegal transactions is wanting, there is no question of rescission,—the transaction is void *ab initio*,—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake. The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a bona fide purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting bona fide dealers with persons in possession, in cases like the present, were much urged in *Thacher v. Moors*, 134 Mass. 156, but did not prevail. Much less can it be allowed to prevail against a legal title without the intervention of statute. Exceptions overruled.

RIPLEY et al. v. DAGGETT.

(71 Ill. 351.)

Supreme Court of Illinois, Sept. Term, 1871.

Ripley brought by John F. Daggett against Abram Ripley and Jacob Ripley to recover a mare which the defendants claimed they had bought of the plaintiff. At the first conversation about the mare, Ripley asked the price the plaintiff swearing that he replied \$165, while the defendant testified that he said \$65. In the second conversation Ripley says he told Daggett that, if the mare was as represented, they would give \$65, and Daggett said he would take him down next morning to see her. Daggett testified that Ripley said to him, "Did I understand you sixty-five?" and that he supposed Ripley referred to the fraction of the \$100, and meant \$165 as named at the previous interview. He answered, "Yes, sixty-five." Both parties then supposed the price was fixed, Ripley supposing it was \$65, and Daggett supposing it was \$165. The next day Ripley saw the mare, and took her home. Judgment for plaintiff, and defendants appealed.

Fellows & Leonard, for appellants. Hill & Dibell, for appellee.

SCOTT, J. It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. There is, however, some evidence tending to show that appellant Ripley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was \$65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession, he met appellant,

but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

There was no error in refusing instructions asked by appellants. The court was asked to tell the jury if they believed, from the evidence, appellee had "sworn willfully and corruptly false in any material portion of his testimony, then they are at liberty to disregard his entire testimony, except so far as it may be corroborated by other evidence in the case." Conceding this instruction states a correct abstract principle of law, there was no necessity for giving it under the facts proven in this case. The verdict was right, and appellants were not prejudiced by the refusal of the court to give it.

All that was pertinent to the issues in the other refused instructions was contained in others that were given, and there was no necessity for repeating it.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

HARKNESS v. RUSSELL & CO.

(7 Sup. Ct. 51, 118 U. S. 663.)

Supreme Court of the United States, Nov. 8, 1886.

Appeal from the supreme court of the territory of Utah.

The facts fully appear in the following statement by Mr. Justice BRADLEY:

This was an appeal from the supreme court of Utah. The action was brought in the district court for Weber county, to recover the value of two steam-engines and boilers, and a portable saw-mill connected with each engine. A jury being waived, the court found the facts, and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the second of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers, and saw-mills for the price of \$4,988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to-wit: "Salt Lake City, October 2, 1882. On or before the first day of May, 1883, for value received in one sixteen-horse portable engine, No. 1,026, and one portable saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, \$300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with ten per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership, or possession of said engine and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due, and take possession of said engine and saw-mill when they may deem themselves insecure even before the maturity of this note; and it is further agreed by the makers hereof that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said saw-mill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may, without sale, indorse the true value of the property on this note, and we agree to pay on the note any balance due thereon, after such indorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt, or claim as exempt, any property, real or personal, we

now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that hereafter may be enacted. P. O., Oxford, Oneida County, Idaho territory, \$300. Phelan & Ferguson." Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson on the execution of the notes, and subsequently they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The territory of Idaho has a law relating to chattel mortgages [act of January 12, 1875], requiring that every such mortgage shall set out certain particulars as to parties, time, amount, etc., with an affidavit attached that it is bona fide, and made without any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson and of Russell & Co. that the title to the said property should not pass from Russell & Co. until all the notes were paid. Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant, and gave judgment for the plaintiff. The supreme court of the territory affirmed this judgment. 7 Pac. 865. This appeal was taken from that judgment.

Parley L. Williams, James N. Kimball and Abbot R. Heywood, on the brief, for appellant. Charles W. Bennett, for appellee.

Mr. Justice BRADLEY, after stating the facts as above reported, delivered the opinion of the court.

The first question to be considered is whether the transaction in question was a conditional sale or a mortgage; that is,

whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit, and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases.

In Lord Blackburn's *Treatise on the Contract of Sale*, published 40 years ago, two rules are laid down as established. (1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; (2) that where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackb. Sales, 152. And it is subsequently added that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property; and, if they do so, their intention is fulfilled." Blackb. Sales, 167.

Mr. Benjamin, in his *Treatise on Sales of Personal Property*, adds to the two formulated rules of Lord Blackburn a third rule,

which is supported by many authorities, to-wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales (2d Ed.) 236; Id. (3d Ed.) § 320. The author cites for this proposition *Bishop v. Stillito*, 2 Barn. & Ald. 329, note a; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Barrow v. Coles* (Lord Ellenborough) 3 Camp. 92; *Swain v. Shepherd* (Baron Parke) 1 Moody & R. 223; *Mires v. Solebay*, 2 Mod. 243.

In the last case, decided in the time of Charles II., one Alston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay the owner a certain sum, he should have the sheep. Before the time expired the owner sold them to another person; and it was held that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed; the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that, if they are not complied with, the goods may be resold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of *Lamond v. Duvall*, 9 Q. B. 1030; and many more cases could be cited.

In *Ex parte Crawcour*, L. R. 9 Ch. Div. 419, certain furniture dealers let Robertson have a lot of furniture upon his paying £10, in cash and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid; and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but, if he failed to pay any of the installments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeals held that the property did not pass by this agreement, and could not be taken as Robertson's property by his trustee under a liquidation proceeding. The same conclusion was reached in the subsequent case of *Crawcour v. Salter*, L. R. 18 Ch. Div. 30.

In these cases, it is true, support of the transaction was sought from a custom which prevails in the places where the transactions took place, of hotel-keepers holding their furniture on hire. But they show that the intent of the parties will be recognized

and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws, beginning with 21 Jac. I. c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration. The following case presents a fair illustration of the English law as based upon the statutes of bankruptcy. In *Horn v. Baker*, 9 East, 215, the owner of a term in a distillery, and of the apparatus and utensils employed therein, demised the same to J. & S. in consideration of an annuity to be paid to the owner and his wife during their several lives, and upon their death the lessees to have the liberty of purchasing the residue of the term, and the apparatus and utensils, with a proviso for re-entry if the annuity should at any time be two months in arrear. The annuity having become in arrear for that period, instead of making entry for condition broken, the wife and administrator of the owner brought suit to recover the arrears, which was stopped by the bankruptcy of J. & S. The question then arose whether the utensils passed to the assignees of J. & S. under the bankrupt act, as being in their possession, order, and disposition as reputed owners; and the court held that they did; but that, if there had been a usage in the trade of letting utensils with a distillery, the case would have admitted a different consideration, since such a custom might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of the goods. This case was followed in *Holroyd v. Gwynne*, 2 Taunt. 176.

This presumption of property in a bankrupt arising from his possession and reputed ownership became so deeply imbedded in the English law that in process of time many persons in the profession, not adverting to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the par-

ties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud; and, when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in states where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In *Hussey v. Thornton*, 4 Mass. 404 (decided in 1808), where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held (Chief Justice Parsons delivering the opinion) that the property did not pass, and that the goods could not be attached by the creditors of the vendee.

This case was followed in 1822 by that of *Marston v. Baldwin*, 17 Mass. 696, which was *replevin* against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay \$100 (part of the price) which condition was not performed, though the goods were delivered. Holt had paid \$75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained.

In *Barrett v. Pritchard*, 2 Pick. 512, the court said: "It is impossible to raise a doubt as to the intention of the parties in this case, for it is expressly stipulated that 'the wool, before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. * * * The case from Taunton (*Holroyd v. Gwynne*) was a case of a conditional sale; but the condition was void as against the policy of the statute 21 Jac. I. c. 19, § 11. It would not have changed the decision in that case if there had been no sale; for, by that statute, if the true owner of goods and chattels suffers another to exercise such control and management over them as to give him the appearance of being the real owner, and he becomes bankrupt, the goods and chattels shall be treated as his property, and shall be assigned by the commissioners

for the benefit of his creditors. The case of *Horn v. Baker*, 9 East, 215, also turned on the same point, and nothing in either of these cases has any bearing on the present question."

In *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 545, the rights of a bona fide purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held, in an able opinion delivered by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith, and without notice. The learned justice commenced his opinion in the following terms: "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a bona fide purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

This case was followed in *Sargent v. Metcalf*, 5 Gray, 306; *Deshon v. Bigelow*, 8 Gray, 159; *Whitney v. Eaton*, 15 Gray, 225; *Hirschorn v. Canney*, 98 Mass, 149; and *Chase v. Ingalls*, 122 Mass, 381; and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of Chief Justice Williams, in the case of

Forbes v. Marsh, 15 Conn. 384 (decided in 1843), in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of *Hart v. Carpenter*, 24 Conn. 427, where the question arose upon the claim of a bona fide purchaser.

In New York the law is the same, at least so far as relates to the vendee in a conditional sale and to his creditors; though there has been some diversity of opinion in its application to bona fide purchasers from such vendee.

As early as 1822, in the case of *Haggerty v. Palmer*, 6 Johns. Ch. 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that indorsed notes should be given in payment, which the purchaser failed to give, Chancellor Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English bankrupt act did not apply here. The chancellor remarked, however, that "if the goods had been fairly sold by P. [the conditional vendee], or if the proceeds had been actually appropriated by the assignees before notice of this suit and of the injunction, the remedy would have been gone."

In *Strong v. Taylor*, 2 Hill, 326, Nelson, C. J., pronouncing the opinion, it was held to be a conditional sale where the agreement was to sell a canal-boat for a certain sum, to be paid in freighting flour and wheat, as directed by the vendor, he to have half the freight until paid in full, with interest. Before the money was all paid the boat was seized under an execution against the vendee; and, in a suit by the vendor against the sheriff, a verdict was found for the plaintiff, under the instruction of the court, and was sustained in banc upon the authority of the Massachusetts case of *Barrett v. Pritchard*, 2 Pick, 512.

In *Herring v. Hoppock*, 15 N. Y. 409, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of Herring. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition or the seller waives it." Comstock, J., said that, if the question were new, it might be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt in the nature of a personal mortgage; but he

considered the law as having been settled by the previous cases, and the court unanimously concurred in the decision.

In the cases of *Smith v. Lyues*, 5 N. Y. 41, and *Wait v. Green*, 35 Barb. 585, on appeal, 36 N. Y. 556, it was held that a bona fide purchaser, without notice from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed, and, we think, substantially overruled, in the subsequent case of *Ballard v. Burgett*, 40 N. Y. 314, in which separate elaborate opinions were delivered by Judges Grover and Lott. This decision was concurred in by Chief Judge Hunt, and Judges Woodruff, Mason, and Daniels; Judges James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained Ballard's claim; and subsequent cases in New York are in harmony with this decision. See *Cole v. Mann*, 62 N. Y. 1; *Bean v. Edge*, 84 N. Y. 510.

We do not perceive that the case of *Dows v. Kidder*, 84 N. Y. 121, is adverse to the ruling in *Ballard v. Burgett*. There, although the plaintiffs stipulated that the title to the corn should not pass until payment of the price (which was to be cash, the same day), yet they indorsed and delivered to the purchaser the evidence of title, namely, the weigher's return, to enable him to take out the bill of lading in his own name, and use it in raising funds to pay the plaintiff. The purchaser misappropriated the funds, and did not pay for the corn. Here the intent of both parties was that the purchaser might dispose of the corn, and he was merely the trustee of the plaintiff, invested by him with the legal title. Of course, the innocent party who purchased the corn from the first purchaser was not bound by the equities between him and the plaintiff.

The later case of *Parker v. Baxter*, 86 N. Y. 586, was precisely similar to *Dows v. Kidder*; and the same principle was involved in *Farwell v. Importers' & Traders' Bank*, 90 N. Y. 483, where the plaintiff delivered his own note to a broker to get it discounted, and the latter pledged it as collateral for a loan made to himself. The legal title passed; and although, as between the plaintiff and the broker, the former was the owner of the note and its proceeds, yet that was an equity which was not binding on the innocent holder.

The decisions in Maine, New Hampshire, and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent

statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property, bargained and delivered to another, shall remain the property of the vendor, shall be valid against third persons without notice. *George v. Stubbs*, 26 Me. 243; *Sawyer v. Fisher*, 32 Me. 28; *Brown v. Haynes*, 52 Me. 578; *Boynnton v. Libby*, 62 Me. 253; *Rogers v. Whitehouse*, 71 Me. 222; *Sargent v. Gile*, 8 N. H. 325; *McFarland v. Farmer*, 42 N. H. 386; *King v. Bates*, 57 N. H. 446; *Hedlin v. Bell*, 30 Vt. 134; *Armington v. Houston*, 38 Vt. 448; *Fales v. Roberts*, 38 Vt. 503; *Duncans v. Stone*, 45 Vt. 123; *Moseley v. Shattuck*, 43 Iowa, 540; *Thorpe v. Fowler*, 57 Iowa, 541, 11 N. W. 3.

The same view of the law has been taken in several other states. In New Jersey, in the case of *Cole v. Berry*, 42 N. J. Law, 308, it was held that a contract for the sale of a sewing-machine to be delivered and paid for by installments, and to remain the property of the vendor until paid for, was a conditional sale, and gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by Judge Depue, in the opinion delivered in *Cole v. Berry*, 42 N. J. Law, 314, where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that in the former instance property does not pass as in favor of creditors and purchasers of the bailee, but that in the latter instance delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to bona fide purchasers." *Chamberlain v. Smith*, 44 Pa. St. 431; *Rose v. Story*, 1 Pa. St. 190; *Martin v. Mathiot*, 14 Serg. & R. 214; *Haak v. Linderman*, 64 Pa. St. 499." But, as the learned judge adds: "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing,—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent per se."

In this connection, see the case of *Copland v. Bosquet*, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, where Mr. Justice Washington and Judge Peters (the former delivering the opinion of the court) sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a bona fide purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought

to our attention is that of *Call v. Seymour*, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes given for installments of the purchase money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the separator and horse-power for which this note is given, is such that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co. until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due, and take possession of said separator and horse-power, at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities pro and con duly considered by the court, which sustained the condition expressed in the contract, and affirmed the judgment for the plaintiff. See, also, *Sanders v. Keber*, 28 Ohio St. 630.

The same law prevails in Indiana. *Shireman v. Jackson*, 14 Ind. 459; *Dunbar v. Rawles*, 28 Ind. 225; *Bradshaw v. Warner*, 54 Ind. 58; *Hedson v. Warner*, 60 Ind. 214; *McGirr v. Sell*, Id. 249. The same in Michigan. *Whitney v. McConnell*, 29 Mich. 12; *Smith v. Lozo*, 42 Mich. 6, 3 N. W. 227; *Marquette Manuf'g Co. v. Jeffery*, 45 Mich. 283, 13 N. W. 592. The same in Missouri. *Ridgeway v. Kennedy*, 52 Mo. 24; *Wangler v. Franklin*, 70 Mo. 659; *Sumner v. Correy*, 71 Mo. 121. The same in Alabama. *Fairbanks v. Eureka*, 67 Ala. 109; *Sumner v. Woods*, Id. 139. The same in several other states. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to *Benj. Sales* (4th Ed.) § 329, pp. 329-336; and Mr. Freeman's note to *Kanaga v. Taylor*, 70 Am. Dec. 62, 7 Ohio St. 131. It is unnecessary to quote further from the decisions. The quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the supreme court of that state is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the mean time, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a bona fide purchaser, or an execution creditor of the latter, is entitled to protection as against the claim of

the original vendor. *Brundage v. Camp*, 21 Ill. 339; *McCormick v. Hadden*, 37 Ill. 370; *Murch v. Wright*, 46 Ill. 488; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 199; *Lucas v. Campbell*, 88 Ill. 447; *Van Duzer v. Allen*, 90 Ill. 499. Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. This statute declares that "no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such.

In the case of *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a certain rent, payable at stated times during the ensuing year, with an agreement that, if the rent was duly paid, the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation of title by the lessors was void as against third persons unless the agreement was recorded (which it was not in proper time), decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the locomotive works could not reclaim it. Mr. Justice Davis, delivering the opinion of the court, said: "It was decided by this court in *Green v. Van Buskirk*, 5 Wall. 397, and 7 Wall. 139, that the liability of property to be sold under legal process issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to

this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. Rev. St. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that state on the subject under consideration.

The case of *Hervey v. Rhode Island Locomotive Works* is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion, for it is apparent that the only points decided in that case were—First, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors after its delivery to the vendees, whereby the latter became the ostensible owners, was void as against third persons. This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other states. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in *Heryford v. Davis*, 102 U. S. 235, a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of *Hervey v. Rhode Island Locomotive Works*, will be found to support their views. The whole question in *Heryford v. Davis* was as to the construction of the contract. This was in the form of a lease, but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agree-

ment had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company." The whole residue of the opinion is occupied with the discussion of the true construction of the contract; and, as we have stated, the conclusion was reached that it was not really a lease nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a bona fide purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a bona fide purchaser without notice. The court below find that, at the time of and prior to the sale, he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners; but as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid as well against third persons

as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts.	until the condition on which the agreement to sell was made, has been performed. The judgment of the supreme court of the territory of Utah is affirmed.
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WAGAR v. DETROIT, L. & N. R. CO.

(44 N. W. 1113, 79 Mich. 648.)

Supreme Court of Michigan. April 11, 1890.

Appeal from circuit court, Ionia county; VERNON H. SMITH, Judge.

Replevin by Humprey R. Wagar against the Detroit, Lansing & Northern Railroad Company, which had taken possession of the property in controversy as being that of John J. Foster & Co. There was judgment for plaintiff, and defendant appeals.

Lemuel & William Clute, (W. E. Hoyt, of counsel,) for appellant. *McGarry & Ford* and W. W. Mitchell, for appellee.

CAMPBELL, J. In this case the facts are found and rest chiefly on documents. The only question in the case which is of any special importance is whether a sale of lumber made by W. F. & G. W. Turner to John J. Foster & Co. passed title to 100,000 feet of mill culls replevied in this suit. On August 17, 1887, W. F. & G. W. Turner owned 125,000 feet of pine mill culls, piled up at Dixon's siding, in piles marked "Mill Culls," but containing more or less other lumber. On that day the Turners sold by absolute bill of sale, and for payment made at the time, 100,000 feet of mill culls, at \$5.50, to be loaded as quickly as possible. The sale was made at the purchaser's office in Greenville. Two days thereafter George W. Turner sold to his brother William F. Turner his undivided half of their joint property, consisting of logs and miscellaneous lumbering property, including lumber piled at Dixon's siding, which included various grades of pine and some hemlock. On the 26th of August, 1887, W. F. Turner sold to plaintiff all the pine and hemlock lumber piled at Dixon's siding, and all the logs and lumber at Stronpe & Payne's mill, at Cedar Lake, in Kent county. This was to be paid for at seven dollars a thousand for all grades above dead culls, deducting cost of manufacture and other expenses, including that of loading on the cars for shipment. This was to be paid as certain notes matured against Turner at two banks named and his remaining bank indebtedness. Plaintiff took such possession as was practicable. On the night of September 5th, Foster & Co. took away from the piles at Dixon's siding 112,945 feet, which included 3,000 feet which had been sawed after their purchase. This whole amount is the property replevied. It is not claimed that this extra 12,945 feet was the property of Foster & Co., and to that extent the plaintiff was entitled to recover. But it is claimed by defendants that the 100,000 feet belonged to Foster & Co. It cannot be disputed that if Foster & Co. owned 100,000 feet of the lumber plaintiff could not get any title to it by his purchase. He could only take what was the property of his vendor. *Tuttle v. White*, 46 Mich. 485, 9 N. W. Rep. 528. Neither can it be claimed that if Foster & Co. ever got title to any lumber they lost it. The only question is whether their purchase was complete, or was a mere agreement to sell.

No principle is more uniformly settled than that title passes by a sale of personal property, where such is the meaning of the

acts of the parties; and it is equally well settled that, where nothing remains to be done by the vendor, title passes. *Lingham v. Eggleston*, 27 Mich. 324; *Wilkinson v. Holiday*, 33 Mich. 386; *Haskell v. Ayres*, 35 Mich. 89; *Grant v. Bank*, Id. 515; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86, 3 N. W. Rep. 269; *Carpenter v. Graham*, 42 Mich. 191, 3 N. W. Rep. 974; *Larkin v. Lumber Co.*, 42 Mich. 296, 3 N. W. Rep. 904. All of these cases—which are but a small number of our own decisions—recognize these principles, and some of them are nearly, and some are precisely, analogous. In *Lingham v. Eggleston* and *Wilkinson v. Holiday*, where title did not, or did not necessarily, pass, the decisions were based on grounds which distinctly recognized the distinctions named. In *Haskell v. Ayres* it was held that a sale of all the merchantable timber on specified lands passed an immediate and complete title, and the merchantable character was a fact which was susceptible of proof, although this quality was found in woods containing other timber, and it must of necessity be to some extent a matter of judgment. In *Grant v. Bank* an agreement was made to convey to a trustee "all the merchantable long timber, not to exceed 20 per cent. of Norway, in the boom at East Tawas, and enough more to make up the quantity to one million feet, at ten and a half dollars per thousand feet, the same to be rafted and delivered to said trustee, free of charges, when required, he furnishing the necessary chains for rafting the same; the sale and delivery in the boom to be made as soon as possible." It was held in this case that a bill of sale and acceptance of order by the boom company passed the title at once, although there were several contingencies and difficulties as to identification, and that such subsequent expenses of rafting and towing as are chargeable to an owner became thereby chargeable to the trustee. In *Iron Cliffs Co. v. Buhl*, when 2,000 tons of ore out of a larger mass were sold to purchasers, who paid for it in full, they were held subject to lose 300 tons, which the bailee failed to transport to them. It was held that, as the mass was of similar kind and character, it made no difference that the one sold was to be taken from it when done by the vendors or their agents. In *Carpenter v. Graham* a sale of a thousand barrels out of a larger number of several thousand passed title before severance, so as to prevail against a seizure under process. In each of the latter cases it required the action of the vendee to identify the property sold, but the vendor had no further control to direct what should be taken. It is impossible to distinguish these cases from the one before us; and where our own decisions reach the case it is not admissible to go beyond them. It is nevertheless stated in Judge HOLMES' note to 2 Kent, Comm. 492, and in Kerr's notes to Benjamin on Sales, § 338, that the prevailing American doctrine sustains the transfer of title to property to be taken by the purchaser from a larger mass. If this doctrine is not true, it would follow that a sale to two different persons of 100,000 feet, in a lumber yard of 200,000 feet, would be of no avail against a subsequent

sale of the whole to a third party. The last purchaser would be no more protected against fraud by the sale to the former purchaser of a particular pile than of part of the lumber, and there is no rule of law which defeats a completed honest sale by a subsequent sale to somebody else, whether the latter is honest or dishonest. But we are only concerned here with enforcing our own decisions, which were not hastily made, and which this court has never declared subject to reconsideration. Any departure from them would amount to an *ex post facto* extinction of rights acquired under them. Under the facts found, plain-

tiff's recovery should not have been allowed, and defendants should have judgment for the value of 100,000 feet of lumber or its return with such damages as have accrued by the expenses of loading and carriage.

MORSE, J., did not sit.

CHAMPLIN, C. J., and LONG and GRANT, JJ. The foregoing opinion was prepared by our late associate. We concur in the opinion, and adopt it as our own. Judgment is reversed, and new trial ordered.

NOAH v. PIERCE.

(48 N. W. 277, 85 Mich. 70.)

Supreme Court of Michigan. Feb. 27, 1891.

Error to circuit court, Allegan county; Dan J. Arnold, Judge.

Taten & Quinsey, for appellant. Padgham & Humphrey, for appellee.

MORSE, J. This is a case originating in justice court, and in which the plaintiff has recovered judgment in that court and the circuit, for the value of a wagon sold at auction for the sum of \$11.75. The circuit judge finds the facts to be, in substance, that the plaintiff had a sale at public auction of his stock and farming tools. "All sums over five dollars" were to be on six months' time, on good approved security. The defendant was present, and plainly saw the wagon, and bid with others upon it. It was struck off to him at \$11.75. After the sale was concluded, and defendant was going home, he said to plaintiff, "I will settle with you for this wagon the first time you come to Moline;" and plaintiff replied, "That is all right." As the parties both then intended and understood the matter, the wagon so bought by the defendant was then his property, and the title had passed to him, and he was to settle for it when the plaintiff came to Moline, where defendant resided. About two weeks after the sale the plaintiff called upon the defendant at Moline, and asked him to settle for the wagon. Defendant replied that he didn't know as he would take it; that he had no use for it; but that he would take it if plaintiff would take his pay out of defendant's store. Plaintiff refused to do this, and defendant refused to settle or pay for the wagon in any other way, and about four months thereafter the plaintiff brought this suit to recover the purchase price of the wagon. It is claimed on the part of the defendant that he supposed he was bidding on another wagon, and not upon the one he bought; that there was, by reason of this mistake, no meeting of the minds of the parties, and hence no sale. But this claim is not made out by the evidence in the case; therefore it becomes unnecessary to deter-

mine whether, if true, it would or would not have the effect claimed. It is claimed there can be no recovery, because it is claimed there was no delivery of the wagon to defendant. The wagon was left where it was when sold to defendant; the plaintiff has not since that time assumed or exercised any control over it, or meddled with it in any way. It has ever since been subject to the defendant's control and disposal. It is claimed that plaintiff should have resold the wagon, and that, had he done this, he could have recovered only the difference between the price received on such resale, and the price bid by defendant, and until such resale there can be no recovery. The proofs show the wagon to have been worth the full sum bid by the defendant at the time it was struck off. The court found, as matters of law, as follows: "(1) The title having passed to defendant, as already found, the measure of damages is not the difference (if any) between the actual value at the time and the sum for which the defendant bought the wagon; and inasmuch as the defendant refused to settle with the plaintiff for the purchase price of the wagon, and to execute any evidence of indebtedness for the amount due in six months with seven per cent. interest, or to pay for the wagon at all except in goods, he was not entitled to the six months mentioned in the printed conditions of sale, but the amount was due and payable at once, as though no conditions of sale had been mentioned. (2) The plaintiff is entitled to have judgment entered in his favor against the defendant for the said sum of \$11.75, together with \$1.77 interest from May 20, 1887, amounting in all to \$13.52, together with his costs of suit in this court, as in cases commenced in this court, to be taxed, and to have execution therefor." Errors are assigned upon the findings of fact by the court, but the record shows that there was testimony tending to support each of such findings, and therefore we cannot disturb them. The conclusions of law upon the facts found are correct. The judgment is affirmed, with costs.

LONG, J., did not sit. The other justices concurred.

LOBDELL et al. v. HORTON.

(40 N. W. 28, 71 Mich. 681.)

Supreme Court of Michigan. Oct. 19, 1888.

Error to circuit court, Mecosta county; C. C. Fuller, Judge.

Assumpsit by Albert W. Lobdell, Moses Berridge, and George R. Slosson, against Thomas G. Horton, for \$671.21, balance due on goods sold. Judgment was entered on a verdict for defendant, and plaintiff brings error.

L. G. Palmer and N. W. Bush, for appellants. Frank Dumon, for appellee.

CHAMPLIN, J. Plaintiff brought assumpsit to recover on an account for goods sold and delivered. The declaration was upon the common counts. The defendant pleaded the general issue, with notice of set-off. On the trial defendant admitted the correctness of plaintiff's claim, subject, however, to be reduced by such set-off as he should be able to prove. The main contention was over a quantity of hemlock logs, which defendant claimed to have sold and delivered to plain-

tiffs, and for which the plaintiffs were to pay him \$2.75 for each thousand feet, as soon as they were sawed, according to the mill tally. The plaintiffs, on the contrary, claimed that the transaction was not an absolute sale, but was intended as a security for an indebtedness which defendant owed to them. The testimony in support of the theory of each party was properly submitted to the jury by the court, and they found in accordance with the defendant's theory. Plaintiffs' claim that, because the logs were not to be paid for until the lumber was sawed and tallied, so as to ascertain the quantity, that the title did not pass. The pith of the question lies in the fact that before the logs were sawed they were mostly destroyed by fire. We have often decided that whether the title passed or not, where something remained to be done before the exact amount to be paid could be arrived at depended upon the intention of the parties, and was a proper question of fact to be determined by a jury. Upon this point the charge was explicit, and we see no occasion for disturbing the verdict. The judgment of the circuit court must be affirmed. The other justices concurred.

Ex parte CRAWCOUR.

In re ROBERTSON.

(9 Ch. Div. 419.)

Court of Appeal. June 27, 1878.

This was an appeal from a decision of Mr. Registrar Hazlitt, acting as chief judge in bankruptcy.

On the 29th of November, 1877, an agreement in writing was entered into between W. A. Robertson, a trader, of the one part, and Lewin Crawcour & Co., upholsterers, of the other part, which contained the following provisions:—

(1.) "That Lewin Crawcour & Co. thereby let to Robertson, and he thereby hired of them, the several articles of furniture and effects belonging to them mentioned in the schedule thereto, and which were admitted by Robertson to be of the value of £63 4s. 10d., adding thereto 5 per cent. on the said value less the amount of first instalment.

(2.) "The said articles of furniture and effects are hired by W. A. Robertson upon the following terms and conditions:—

(3.) "W. A. Robertson is to pay to Lewin Crawcour & Co. the sum of £10 on the signing hereof, £5 on the 4th of January next, and £5 on the 4th day of each succeeding calendar month during the continuance of this agreement, and is also on the signing hereof to deposit with Lewin Crawcour & Co. promissory notes for the total amount of the instalments to be paid hereunder, such promissory notes being given as collateral security, and entirely without prejudice to the title of Lewin Crawcour & Co. in or to the said furniture and effects, and of all rights reserved to them by this agreement, and subject to this stipulation, that, in case of the goods being seized and removed by Lewin Crawcour & Co. under clause 5, the whole of such promissory notes, or so many of them as shall then be current, shall after such seizure and removal be given up on demand to W. A. Robertson, and shall from and after such seizure and removal become absolutely void.

(4.) "W. A. Robertson is to keep the rent of the premises in which the said furniture and effects are placed regularly and punctually paid, and not to part with possession of, remove, or otherwise deal with the said goods, or any part thereof, nor to part with the possession of, or assign his interest in, the house or premises wherein the said goods may be, without the consent in writing of Lewin Crawcour & Co. being first obtained.

(5.) "In the event of non-payment of any of the above notes on the days upon which they respectively become due, or of the breach of any of the conditions herein expressed to be performed by W. A. Robertson, or in case the said furniture and effects, or any part thereof shall be seized or taken in execution under any process of any court either of law or of equity, Lewin Crawcour & Co. may by themselves, or others, their servants or agents,

enter into any house or place where the said articles of furniture or any of them shall then be, and seize, remove, and retake possession of the same, as in their first and former estate, notwithstanding any payments made by W. A. Robertson, and Robertson shall be barred from commencing or maintaining any action of trespass or otherwise by reason of such taking possession as aforesaid, or of the temporary possession of the premises wherein the said goods may be, for such time as may be reasonably occupied in such removal, or for the recovery of any part of the moneys paid under this agreement, which, upon such default or breach as aforesaid, it is hereby agreed are to be absolutely forfeited to Lewin Crawcour & Co.

(6.) "Upon payment by W. A. Robertson to Lewin Crawcour & Co. of the full sum of £65 17s. 10d. by the instalments aforesaid the agreement shall be deemed completed, and shall thenceforth close and determine, and the said furniture and effects shall become and be the property of W. A. Robertson; but until the whole of the said sum shall have been paid the said articles of furniture and effects shall remain the sole and absolute property of Lewin Crawcour & Co., and are only let on hire to W. A. Robertson, who hereby agrees to take all proper care of the same during the hiring, and, in case of damage by fire or otherwise, W. A. Robertson will bear the loss or risk."

The articles mentioned in the schedule to the agreement consisted of ordinary household furniture. Soon after the execution of the agreement they were delivered at Robertson's private residence. On the 9th of January, 1878, Robertson filed a liquidation petition, under which a trustee was appointed, who, on the 26th of February, took possession of the furniture comprised in the agreement of the 29th of November, 1877, which was still in debtor's house, and remained in possession of it until the 19th of March, 1878, when Lewin Crawcour & Co. took possession of it. The instalments of rent due in February and March had not been paid. On the 22nd of March the trustee obtained from the court of bankruptcy an injunction restraining Lewin Crawcour & Co. from removing the furniture, and the injunction was continued from time to time. On the 30th of March the trustee gave notice of an application to the court for an order declaring that the furniture formed part of the property of the debtor divisible among his creditors, and belonged to the trustee. This application was heard on the 24th of May, 1878. On behalf of the trustee it was contended that the hiring agreement was void as against him, because it had not been registered under the bills of sale act, 1854; and, moreover, that he was entitled to the furniture as being, at the commencement of the liquidation, in the order and disposition of the debtor, with the consent of the true owners. On the latter point a number of affidavits were filed by Lewin Crawcour &

Co. to prove that there is a notorious custom of letting furniture upon terms similar to those of the agreement of the 29th of November, 1877, and it was said that this custom excluded the operation of the reputed ownership clause. These affidavits were answered by a number of affidavits filed on behalf of the trustee, which denied the existence, or at any rate the notoriety, of any such custom. The registrar held that the agreement ought to have been registered as a bill of sale, and that, by reason of its non-registration, it was void as against the trustee; and on this ground, without going into the question of order and disposition, he made the order asked for, granting a perpetual injunction to restrain Lewin Crawcour & Co. from interfering with the furniture. Lewin Crawcour & Co. appealed.

Winslow, Q. C., and Finlay Knight, for appellants. Yate Lee, for trustee.

JESSEL, M. R.:—I cannot concur in the ground of the registrar's decision. Whether it can be supported on other grounds will be a matter for discussion at a future time. The registrar rested the title of the trustee simply on this, that the agreement was a bill of sale, and that it was void as against the trustee because it was not registered. It appears to me that the agreement was not a bill of sale by Robertson, who is the person by whom a bill of sale must have been executed if it is to be hit by the bills of sale act. Robertson never had any property in the goods. Crawcour & Co., to whom they originally belonged, agreed to let them on hire to Robertson at a rent to be paid by instalments, with this further provision, that, until all the instalments had been paid, the property should remain in Crawcour & Co., and that, if any instalment should not be paid when it became due, they should be at liberty to retake possession of their own goods, and the instalments already

paid should be forfeited to them. That does not make the document a bill of sale executed by Robertson, or a license given by him to take possession of personal chattels as security for a debt. It is simply one of the terms of the letting for hire and conditional sale of the goods by Crawcour & Co. to him. When the liquidation petition was filed, some instalments of the rent being overdue, Crawcour & Co. attempted to take possession of their goods. It appears to me that they were entitled to do so, and that there was no reason for granting the injunction.

JAMES, L. J.:—I am of the same opinion.

BRETT, L. J.:—It is said that this agreement contains a license by Robertson to Crawcour & Co. to take possession of his goods, and that it therefore amounts to a bill of sale within sect. 7 of the bills of sale act. The only way, however, in which Robertson could have any interest in the goods or any right to deal with them was by virtue of the agreement itself. It is said that the agreement passed the property in the goods to Robertson, and that by it he at the same time mortgaged the goods to Crawcour & Co., and gave them a license to seize them. The sole question therefore is, whether the property in the goods passed to Robertson. In my opinion the property did not pass by the agreement. To hold that it did would be clearly contrary to the expressed intention of the parties. Nor do I think that the property passed by the delivery of the goods, which was made in accordance with the agreement. In my opinion the property could not pass until all the instalments had been paid, and that has not been done yet.

The appeal was allowed, with costs fixed at £20, and the case was referred back to the registrar to try the question of reputed ownership.

FIRST NAT. BANK OF CAIRO v.
CROCKER et al.

(111 Mass. 163.)

Supreme Judicial Court of Massachusetts, Suffolk, Nov., 1872.

Tort against Crocker, Smith & Co. for the conversion of 100 barrels of flour. It appeared on the trial that Ayers & Co., of Cairo, Illinois, had dealt with defendant commission merchants in Boston for some years, shipping them flour on consignment, for sale in Boston, and having an open general consignment account with them. Ayers & Co., on August 23, 1870, consigned to them some flour, and drew on them for more than its value, writing them that they would make it all right in the next shipment. The defendants paid the draft, which left Ayers & Co. indebted to defendants for about \$1500. On August 24, 1870, Ayers & Co. shipped the 100 barrels of flour in dispute to Boston, taking a bill of lading "consigned to shipper's order Boston, Mass.," but on which was written "St. Louis Mills and Blackburn. For Crocker, Smith & Co., Boston, Mass." They then drew on defendants with bill of lading attached, and discounted the draft, which defendants refused to accept, and it was returned to defendants with the bill of lading. When the flour arrived in Boston, September 12, 1870, it was accompanied by a way bill, on which, under "Consignees," was written "Crocker, Smith & Co., Boston;" and the flour was received by them and sold, and applied to the account of Ayers & Co. September 14, 1870, Ayers & Co. drew a draft on account of the 100 barrels of flour on Goodwin, Locke & Co. of Boston, in favor of plaintiffs, and attached to it the bill of lading. The draft was accepted and paid when due. The bill of lading was indorsed in blank when delivered by Ayers & Co., but when forwarded by plaintiffs the words "Deliver within-named flour to Goodwin, Locke & Company, or order," were written over the indorsement of Ayers & Co.

A. Churchill and J. E. Hudson, for plaintiffs.
A. A. Ranney, for defendants.

AMES, J. It is manifest that the flour was not placed in the hands of these defendants for the purpose of securing an existing debt, or indemnifying them for any advances that they had made. It was not consigned to them in order that it might be sold, and the proceeds carried to the credit of Ayers & Company in general account current. It is true that the consignors knew that they had overdrawn their account, and that they had expressly promised to "make it all right" at the next shipment. But that was an executory contract. The proposed correction stood wholly in agreement. A general promise to make the matter right was not of itself sufficient to vest in the defendants a title as absolute owners, even of the goods forwarded at the next shipment, unless the circumstances indicated, or at least were consistent with, such an in-

tention on the part of the shippers. But in this case, the consignment and the draft constituted one transaction. The bill of lading and the draft came together; and the defendants understood that the flour was sent to them, subject to a claim of \$500 in favor of the holder of the draft. They were to receive it upon the trust that they were to pay that amount out of the proceeds. The meaning of the transaction on the part of the shippers was that the defendants were to receive it for that purpose and upon that understanding only. It was as if they had said, "You may take this flour and sell it on our account, provided you will accept this draft." A bill of lading indorsed is only *prima facie* evidence of ownership, and is open to explanation. *Pratt v. Parkman*, 24 Pick. 42. This bill of lading was provisional, and was not intended to vest the property in the defendants, or to authorize their taking possession of it, except upon the condition of their acceptance of the draft. *Allen v. Williams*, 12 Pick. 297.

The act of the defendants, therefore, in taking possession of the flour was wholly unauthorized, and gave them neither valid title nor lawful possession. *Allen v. Williams*, *ubi supra*. In proceeding afterwards to sell it as if it were their own, and appropriating the proceeds, they were guilty of a wrongful conversion. A carrier may be a mere bailee for the consignor; and where by the terms of the bill of lading the goods are to be delivered to the consignor's order, the carrier is his agent, and not the consignee's. *Moakes v. Nicolson*, 19 C. B. (N. S.) 290; *Baker v. Fuller*, 21 Pick. 248; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291. On the refusal of the consignee to receive the goods upon the terms and for the purposes for which they were sent, he cannot take them for any other purpose. *Shepherd v. Harrison*, L. R. 5 H. L. 116; *De Wolf v. Gardner*, 12 Cush. 19, 23; *Allen v. Williams*, 12 Pick. 297. The title to the flour therefore remained in the shipper, wholly unaffected by the consignment. Even in the case of a contract of sale, the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary, is decisive to show his intention to preserve the *ius disponendi*, and to prevent the property from passing to the vendee. *Wait v. Baker*, 2 Exch. 1; *Van Casteel v. Booker*, Id. 631. The case of a mere consignment to an agent would be of course still stronger.

Upon the refusal of the defendants to accept the consignment upon the terms proposed, which refusal was sufficiently manifested by the protest of the draft and the return of the bill of lading, the owners of the flour, Ayers & Company, had a right to seek a new consignee, and to make another attempt to obtain an advance by a draft to be charged against the property. An arrangement was accordingly made with the plaintiffs, who discounted their draft of \$100 upon the security of the same bill of lading that had been sent to the defendants and returned by them. If this bill

of lading was delivered to the plaintiffs, indorsed in blank by Ayers & Company, (and there is testimony to that effect,) the transaction would operate as a transfer of their title in the flour to the plaintiffs, if such were the intention of the parties. As the property was at that time in Boston, it was of course incapable of actual delivery at Cairo, and the delivery of the evidence of title, with the indorsement upon the bill of lading, was all that could be done for the transfer of the property from the general owner to the new purchaser; but it would be effectual for that purpose. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 445; *Gibson v. Stevens*, 8 How. 384; *Bryans v. Nix*, 4 M. & W. 775, 791; *Low v. De Wolf*, 8 Pick. 101; *Gardner v. Howland*, 2 Pick. 599; *Stanton v. Small*, 3 Sandf. 239; *Pratt v. Parkman*, 21 Pick. 42. In *Gibson v. Stevens*, the court say, per Taney, C. J.: "This rule applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery." To the extent of their advance of money upon the draft, therefore, the plaintiffs would be considered as purchasers, and they would acquire a special property in the flour for the purpose of protecting the draft. At the time of this transaction, the flour remained in the possession of the defendants, and, with the exception of taking possession, nothing had been done on their part amounting to a wrongful conversion of it to their own use. They had not put it out of their power to replace the shippers in the enjoyment of their rights.

It appears from the report, that, when the bill of lading was forwarded the second time, the name of the firm of Goodwin, Locke & Company was written over the indorsement of Ayers & Company. But we do not think that this fact, whether the blank indorsement were filled up after or before the discount of the draft, would materially affect the plaintiffs' rights. The bill of lading was attached to the draft, and the substance of the transaction was that the draft was discounted upon the security of the merchandise itself. It purports to be on account of the barrels of flour described in the bill of lading. The flour, although intrusted to Goodwin, Locke & Company to sell, was appropriated to the specific purpose of the payment of this draft. The bill of lading was put in the plaintiffs' hands to enable them to hold the merchandise as their security, and the discounting of the draft was the consideration for the transfer of the property to them. It was convenient so to indorse the bill of lading, as to make it manifest that Goodwin, Locke & Company were to receive and dispose of the goods; but they were to do so as trustees and agents of the plaintiffs, and not as proprietors in their own right. They certainly acquired no title in the property until they had accepted the draft, and when that event happened the goods had been disposed of by the defendants, and had gone into the hands of bona fide holders without notice, so as to be beyond recall. The ef-

fect of this transaction between the plaintiffs and Ayers & Company was that the flour was designated to stand as collateral security for the draft. If the draft had not been accepted, the plaintiffs clearly would not have lost their title to the flour. It is not necessary to hold that the plaintiffs became absolute owners of the property; it is enough that they had a right of property and possession to secure the payment of the draft, and the right of Ayers & Company as former owners of the specific property had become divested, leaving them only a right in the surplus money which might remain after a sale of the flour and a payment of the draft from the proceeds. *De Wolf v. Gardner*, 12 Cush. 19, has in many respects a close analogy with this case. There the general owner of the flour was the plaintiff, and the defendant was a party claiming under the new consignee, and the court held that the plaintiff had parted with the right of property, and could not maintain his action. In *Bank of Rochester v. Jones*, 4 N. Y. 497, as in the case at bar, the plaintiffs had discounted a draft drawn by the owner of a quantity of flour upon the defendant, who, as in the case at bar, refused to accept the draft, and claimed to hold the flour and sold it for the payment of a balance due from the drawer. Instead of a bill of lading, there had been a carrier's receipt, which the drawer delivered, mindorsed, to the plaintiff bank. The agreement was that the bank should hold the flour as security that the draft should be accepted, but with power to sell it if the draft should not be accepted. The court of appeals held that the defendant could not acquire any property in the flour, except by performance of the condition imposed, namely, the acceptance of the draft; that the transaction between the consignor and the plaintiff bank gave to the latter a general or special property in the flour; that the transaction constituted a sale to the bank in trust for the fulfillment of the agreement; that the carrier's receipt, though not indorsed, was sufficient evidence of the plaintiff's right of possession; and that the statute of frauds was not applicable, as the delivery of the receipt, in consideration of the discount of the draft, was sufficient to transfer the title. In legal effect, and for the purpose of explaining what is to be done with the merchandise, there can be no substantial difference between a bill of lading and a carrier's receipt.

We have then in this case an intent of the general owners of the flour to make use of it as a security for an advance of money from the plaintiffs; a delivery of the bill of lading in pursuance of that intent; and a valuable and executed consideration in the discounting of the draft. The fact that the goods were in the custody of the defendants would not prevent this arrangement from having the effect to transfer the title of Ayers & Company to the plaintiffs. *Whipple v. Thayer*, 16 Pick. 25; *McKee v. Judd*, 12 N. Y. 622. Whether it should be regarded as a sale, a pledge or a mort-

gage, there was a sufficient delivery to give to the plaintiffs a special property, which they could enforce by suit against any wrongdoer. They had a right to transfer the property, subject to the same trusts upon which they held it themselves, to their correspondent or agent in Boston, and it may well be that, if the draft had been accepted by Goodwin, Locke & Company before the flour had been sold and placed out of their reach, they would have been the proper parties to have brought this action. But the transfer to them for that reason wholly failed to take effect, and they acquired no title to the flour specifically. If they had accepted the draft before the flour had been sold to a bona fide purchaser, the case would have been almost exactly like *Allen v. Williams*, above cited. That was a case in which the consignee of merchandise refused to accept the draft which accompanied the bill of lading, and took possession of the

merchandise, claiming as in this case the right to do so in order to secure a balance due to him from the consignor. The court held that a new consignee could maintain trover against him.

Our conclusion then is, that at the time of the sale of the flour by the defendants, the plaintiffs had a right and property in it, which, whether general or special, and whether as purchasers, trustees, pledgees or mortgagees, gave them a right of possession as against all wrongdoers; and that the defendants had no title whatever and were mere wrongdoers. The fact that the draft has been paid by the new consignees does not prevent the plaintiffs from maintaining the action for the benefit and protection of the acceptors of the draft, who without fault of their own have been deprived of the security upon which it was discounted.

Judgment for the plaintiffs.

MACOMBER et al. v. PARKER.

(13 Pick. 175.)

Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 20, 1832.

Replevin for three kilns of bricks attached by the defendant on several writs against Joseph Evans, Plea, property in Evans. Replication, property in the plaintiffs. Trial before Shaw, C. J.

It was proved that Hunting & Lawrence had a certain brick-yard in Cambridge, originally leased by A. Binney to J. Wilson, who assigned the lease to Hunting & Lawrence.

On the 1st of March, 1829, the following agreement was made between Hunting & Lawrence on one part and Evans on the other:—"Memorandum of an agreement &c. sheweth, that said Evans has agreed to make or cause to be made from eight to ten hundred thousand good merchantable brick in the brick-yard at Cambridge &c.; said Evans agrees to hire the men and board to the best advantage, to perform the manufacturing of said brick, and said Evans agrees to give in his time and services in making said brick; and said Hunting & Lawrence agree to attend to selling of brick, purchasing of wood and all necessary materials for the manufacturing, collecting the bills &c. to the best advantage, and after the brick are made, and the labor and board of the men are paid, and all materials and tools of every kind are paid for, and the said Evans paying to said Hunting & Lawrence sixty cents per thousand for each and every thousand brick made or clay sold, as rent therefor, then the parties agree to share the profits or loss, as the case may be, one half each; said Evans agrees to pay every attention to have the brick made in the best manner and in good season for making brick; said Hunting & Lawrence shall have full power to retain said Evans's part of the brick or money collected or debts due for brick &c., in their possession, to the amount of all sums of money now due from said Evans and such other sums of money, goods &c., as they may from time to time advance him; all of which the parties agree to perform according to the true intent and meaning."

No lease of the yard was given to Evans, and Hunting testified that Hunting & Lawrence expected to secure to themselves by the foregoing contract, a lien on the bricks to be manufactured in pursuance thereof, for the payment of any balance that might be due them.

The plaintiffs offered to prove, that under such contracts for the manufacture of bricks, it is customary for the owners of yards to retain all in their hands and account with the makers of bricks for their share of the profits, after the sales are made and the proceeds collected. This evidence was rejected by the court.

On the 3d of July 1829, Hunting & Law-

rence stopped payment and assigned all their property, including the brick-yard and all their interest therein and property thereon, to the plaintiffs, for the benefit of the creditors of the assignors, and on the same day delivered possession of the yard and all the property thereon to the plaintiffs, in presence of Evans; and the plaintiffs then and there appointed Evans their agent, by a writing as follows:—"You will please take the charge and care of all the property and effects in and about the brick-yard &c., the said property having been this day assigned to us &c., you will proceed to sell the same at retail until further orders from us, for cash only, and whenever \$100 is received, you will deposit the same in the Branch Bank to our credit. Please keep and render us an exact account of your doings herein."

Hunting & Lawrence made large advances for the yard in 1829. Evans as agent of the plaintiffs, thus appointed, sold bricks to divers persons.

On Friday, February 26, 1830, the plaintiffs put a stop to sales by Evans, and directed Hunting, who had been their agent in the business of the yard, to make a final settlement with Evans; and Hunting and Evans thereupon looked over the statements and accounts and cast them up for that purpose.

Hunting testified that at this settlement Evans agreed to cart all the bricks; the common bricks, at five shillings per thousand. No price was fixed for the faced bricks. Upon the settlement, the witness, in behalf of the assignees, agreed to take all the bricks at certain estimated prices. The assignees meant to take all the property and allow Evans his half in account. The bricks were estimated at 370 thousand, and at the estimated prices amounted to \$1830; the board &c. at \$200; making \$2030. Taking the whole to the account of the assignees and crediting Evans his part, there would still be a balance due to the assignees, which was to be paid in carting. It was agreed, that if the bricks overran the estimated number, the assignees should account to Evans, and if they fell short, he should account to them, for the difference. They were to be counted in the course of the ensuing week. It was agreed that this should be a definitive settlement, as Evans was not to take the yard again. Nothing remained but to count the bricks, and make the allowance on the one side or the other, if the number varied from the estimate. On cross-examination the witness testified, that at this settlement there was an express understanding with Evans, that the assignees were to take the bricks to their own account; it was a sale of his half. Evans stated expressly that the workmen had all been paid, and that he had paid all charges. Evans after this settlement carried one load of bricks to G. W. Blake. The assignees were to take Evans's half, as they owned one half before. The witness considered the bargain and sale complete, except

that the bricks were to be counted. That was to be done the fore part of the ensuing week. When the witness went over to take the count, he found the bricks had been attached as the property of Evans. Had it not been for the attachment, a regular account current would have been settled. The witness understood that Evans was to proceed immediately to cart the bricks to Boston, which he solicited, but the final settlement was not to wait till the bricks were carted, but was to be finished as soon as they were counted.

The defendant was proceeding in his defence, when a question arose, whether the plaintiffs had made out a *prima facie* case. It being necessary that they should show that they were the sole owners of the property in these bricks, two preliminary questions arose, viz:—

1. Whether by the terms of the contract Evans was interested in the bricks, as joint tenant or tenant in common, when they were made in pursuance of the contract and were fit for market;—

2. If that were so, then whether upon the facts stated, such a sale and delivery had been made by Evans before the attachment, as to divest his interest.

A nonsuit was ordered, subject to the opinion of the whole court.

D. A. Simmons and Gay, for plaintiffs, Buttrick & Ashmun, for defendant.

WILDE, J., delivered the opinion of the court. It was objected at the trial, that the plaintiffs had not made out a *prima facie* case, and two questions were thereupon reserved for the consideration of the whole court.

1. Whether by the terms of the contract between Hunting & Lawrence and Evans, the latter, under whom the defendant claims, was interested in the bricks in question as joint tenant or tenant in common, when they were made in pursuance of that contract and were fit for market.

2. If that were so, then whether, upon the facts proved, such a sale and delivery had been made by Evans at the time of the defendant's attachment, as to divest his interest.

As to the first question, we are of opinion, that by the terms of the contract, the bricks when made were the joint property of the contracting parties. By this contract Hunting & Lawrence were to furnish the materials for manufacturing the bricks, and to attend to the sale of them; Evans on his part undertook to manufacture the bricks, to hire and board the laborers employed for that purpose, and to allow Hunting & Lawrence sixty cents per thousand for every thousand of bricks made or clay sold, as rent thereof; and after all expenses should be paid, then the parties agreed to share the profit and loss, as the case might be, one half each.

That this amounts to a complete contract of partnership, cannot, we think, admit of a doubt. Partnership is defined to be a voluntary contract between two or more persons, for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement, that the gain or loss shall be divided proportionably between them. *Gow, 2.* With this definition the contract in question fully agrees. It contains every essential requisite in a contract of partnership. The parties agreed to join together their property, skill and labor, for the purpose of accomplishing an enterprise, in which they were to have a communion of interest and a communion of profit and loss. The bricks, therefore, when made were their joint property, and when the partnership was dissolved, and Hunting & Lawrence assigned their share to the plaintiffs, the latter became tenants in common with Evans.

The plaintiffs offered to prove, for the purpose of showing that Evans had no property in the bricks, and was only entitled to a share of the proceeds of sale of them when disposed of, that it was usual and customary for the owners of yards, under similar contracts, to retain all in their hands, and account with the makers of the bricks for their share of the profits after the sales were made and proceeds collected. This evidence was rejected by the judge who presided at the trial, and we think very properly. The usages of trade may be admitted to aid in the construction of doubtful contracts; but the terms of the present contract are by no means doubtful. So far as the question of partnership or of the right of property is concerned, the contract is clearly and explicitly expressed, and the supposed usage, if admitted, could not affect its construction. It would only prove how other parties had considered similar contracts. Indeed, it would hardly prove so much, for if other owners of yards had retained possession of the property there manufactured, it might be by consent, or for the convenience of the parties, and not under the claim of any legal right. Besides, the contract expressly admits that Evans would be entitled to a share of the bricks, and stipulates that Hunting & Lawrence might retain the same as security for any balance which was or might be due from him to them; so that the evidence of usage, if it were admissible, would be wholly immaterial.

The remaining question is, whether before the attachment by the defendant there was a valid sale from Evans to the plaintiffs. It is objected in the first place, that the contract of sale was not completed, because the bricks had not been counted according to the stipulation between the parties to that effect. And if the counting was intended by the parties to precede the completion of the sale, then undoubtedly the objection must prevail. The evidence, however, does not support this objection, but rather shows that the sale was

considered as complete and absolute at the time when the settlement between Evans and the plaintiffs was made; or at least the jury would be warranted by the testimony of Hunting, to find that such was the intention of the contracting parties. The whole bricks were estimated at 370 thousand. Evans sold his share in the whole and received pay in account, and a balance was due to the plaintiffs which was to be paid for in carting the bricks, so far as that might go. It is true the bricks were to be counted, but that was to be done to enable the parties to come to a settlement of their accounts, and not for the purpose of completing the sale. Taking the whole of Hunting's testimony together, this, we think, is the reasonable inference to be drawn from it. If the bricks had been actually delivered, there could have been no question that the sale would have been complete, notwithstanding the bricks were to be afterwards counted. The general principle is, that where any operation of weight, measurement, counting or the like, remains to be performed, in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed. *Brown, Sales, 44.* But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit before the actual payment of the price. Nothing can be found in any of the numerous cases on this point, which militates against this position.

We come, then, to the second objection to the sale, namely, that there was no delivery.

In answer to this objection it was said, as Evans agreed to cart the bricks and did actually cart one load after the sale, this may be considered as a delivery of a part under an entire sale, and so according to the authorities would amount to a constructive delivery of the whole. Perhaps this may be so, but we do not think, under the circumstances of this case, that any actual delivery was necessary. The plaintiffs were in fact as much in possession of the bricks as Evans was; he was their agent; the bricks were remaining in their yard, and under the circumstances proved, a delivery would be altogether an unmeaning ceremony. The plaintiffs accepted the bricks, gave orders to Evans to cart them, and in all respects treated them as their property. The sale, therefore, amounted to a transfer, and was so considered by the parties.

Then it was objected, that the sale was void by the statute of frauds; but as here was a delivery of a part, that alone would take the case out of the statute. But that which took place was equivalent to a delivery of the whole, and therefore the statute of frauds can have no application. Whether this sale was void as against creditors, is a question not now to be considered; nor have we considered the question, whether the plaintiffs, before the sale, had a lien on the brick as security for the balance due them from Evans, since our opinion as to the sale renders this question immaterial. These questions may be raised on another trial, but at present we confine ourselves to the two questions reserved by the report. As to one of these questions, namely, that touching the sale, evidence may be offered by the defendant which may have a material bearing; but as the evidence is reported, we are all of opinion that the plaintiffs have made out a *prima facie* case, and the nonsuit must be set aside and a new trial granted.

JENNER v. SMITH.

(L. R. 4 C. P. 270.)

Common Pleas. April 30, 1869.

Action for goods bargained and sold and goods sold and delivered. Pleas: Never indebted, payment, and payment of 8s. 2d. into court. Replication, taking issue, and damages ultra.

The cause was tried before Brett, J., at the sittings at Westminster after last Michaelmas term. The facts were as follows: On the 14th of October, 1867, the plaintiff, who is a hop-merchant in London, met the defendant, a malster of Devizes, at Weyhill Fair, Hants. The defendant wished to buy of the plaintiff four pockets of Carpenter's Sussex hops which the plaintiff had there; but, as the plaintiff had already sold two of them, he proposed to sell the defendant in lieu of them two pockets of Thorpe's, of which he showed him a sample, offering to let the defendant have the two pockets of Carpenter's at £9 per cwt. (the price of that day's fair being £9 9s.), if he would take two pockets of Thorpe's at £7 15s. per cwt. The plaintiff at the same time or shortly after informed the defendant that the last-mentioned two pockets were lying at Prid & Son's warehouse, Kentish Buildings, Southwark, and agreed that he should have them upon the same terms as if they had been in bulk at the fair, that is, that he should be at no expense for warehousing or carriage. The defendant consented to purchase the four pockets upon these terms, and took away with him the two pockets of Carpenter's, but requested that the two pockets of Thorpe's should not be sent until he wrote for them.

The plaintiff had at this time three pockets of Thorpe's hops at the warehouse of Prid & Son. On the 21st of October, the plaintiff's son went to the warehouse, and instructed the warehouseman to set apart two of the three pockets of Thorpe's for the defendant; and the warehouseman thereupon placed on two of them, numbered respectively one and three, what is called a "wait order card," that is, a card upon which was written, "To wait orders," and the name of the vendee. No alteration, however, was made in the warehouse books; and the plaintiff, the original depositor, still remained liable for the rent.

On the 4th of November, the plaintiff sent the defendant an invoice as follows, at the same time inclosing a draft for acceptance:—

Mr. S. Smith, Bought of Charles Jenner:	
2 pockets Sussex hops (Carpenter, 1867).	
No. 2 . . .	1 cwt., 2 qrs., 26 lbs.
4 . . .	1 cwt., 2 qrs., 13 lbs.
<hr/>	
3 cwt., 1 qr., 11 lbs. @	£9 per cwt. £30 2s. 8d.
2 pockets Sussex hops (Thorpe, 1867).	
No. 1 . . .	1 cwt., 2 qrs., 27 lbs.
3 . . .	1 cwt. 0 qr., 21 lbs.
<hr/>	
2 cwt. 3 qrs., 20 lbs. @	£7 15s. per cwt. £22 13s. 10d.
<hr/>	
£52 16s. 6d.	

The two last pockets of hops are lying to your order.

On the 8th of November the defendant wrote to the plaintiff as follows:—

Sir,—I have returned your bill unsigned; but, as I have never received the two pockets of hops or heard any thing about them, I concluded you had not thought of sending them, and have made an exchange for some malt, and shall not require them. As I will never sign a bill, I will pay, as was agreed, in February, the weight of the two Carpenter's.

The defendant subsequently paid the price of the two pockets which he had received, all but a small balance which was covered by the payment into court.

It was objected on the part of the defendant that, as to the two pockets of Thorpe's hops, there was no contract binding within the statute of frauds, no delivery or acceptance, or part payment, and no evidence of goods bargained and sold.

For the plaintiff it was insisted that the whole was one bargain, and consequently that there had been a part delivery and part payment, and that the property in the whole four pockets passed by the contract.

The learned judge ruled that it was one entire contract, and that, therefore, there had been a part delivery so as to make a contract binding within the statute of frauds, that the plaintiff could not rely upon the part payment, because the defendant, at the time of making the payment, repudiated the bargain as to the two pockets in question; that, though there was a binding contract, the property did not pass thereby, inasmuch as the contract was to deliver two out of a larger number of pockets of Thorpe's hops equal to sample, the price to be determined according to the weight; and that there had been no sufficient appropriation afterwards to pass the property, because Prid & Son never bound themselves to hold for the defendant instead of for the plaintiff. He thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for £22 13s. 10d., the court to draw inferences of fact.

Morgan Lloyd, in Hilary term last, obtained a rule nisi accordingly. H. T. Cole, Q. C., and Bromley showed cause. Morgan Lloyd, in support of the rule.

KEATING, J. I am of opinion that this rule should be discharged. The action is brought to recover the price of two pockets of hops as sold and delivered and bargained and sold. It appears that the parties met in October, 1867, at Weyhill Fair, and that it was orally agreed between them that the defendant should purchase of the plaintiff two pockets of Carpenter's Sussex hops, which were then in the fair, and had been inspected by the defendant, at £9 per cwt., and also two pockets of Thorpe's hops, of which a sample was shown, at £7 15s. per

cwt. After the purchase had been agreed on, the defendant was informed that the latter were lying in a warehouse in London, and he requested that they might be left there until he sent word that he was ready to receive them. On the 4th of November the plaintiff sent an invoice describing the numbers, weight, and price of the four pockets, with an intimation that the two pockets of Thorpe's were lying at the warehouse to the defendant's orders. The plaintiff had three pockets of Thorpe's hops at the warehouse; and he had in the mean time gone to the warehouse and directed the warehouse-keeper to put certain marks upon two of them, to indicate that they were sold and were to wait the orders of the purchaser. No alteration, however, was made in the books of the warehouse-keeper; nor was any intimation of this appropriation of the two pockets given to the defendant until the 4th of November, when the invoice was forwarded to him. The defendant declined to accept the two pockets. At the trial various objections were urged. It was said, amongst other things, that there was no contract as to the two pockets of Thorpe's hops to bind the defendant within § 17 of the statute of frauds; that the contracts for the purchase of the two pockets of Carpenter's hops and for the two pockets of Thorpe's were distinct contracts; and that, consequently, there had been no delivery or part-payment to take the case out of the statute. My brother Brett ruled that the contract was entire, and the objection founded upon the statute of frauds was thus got rid of. Then came the question whether the count for goods sold and delivered or goods bargained and sold could be maintained, the property in the goods not having passed. Upon this my brother Brett nonsuited the plaintiff, but gave leave to move to enter a verdict for the plaintiff for the price of the two pockets in dispute reserving power to the court to draw such inferences as a jury might draw. The question before us, therefore is, whether, upon the facts proved, we can see that the property in the hops passed to the defendant so as to make him liable in this action. The general rule of law was not contested on the part of the plaintiff, that, where an article (not specific) is sold, but something remains to be done by the vendor before it is despatched to the vendee, no property passes by the contract of sale. It was contended on the part of the defendant that much remained to be done here before the property could pass,—that, the hops having been sold by sample, they would require to be inspected, and to be weighed, in order to ascertain the price. On the other hand it was urged that, though that may be so as a general rule, *Aldridge v. Johnson* (7 El. & Bl. 885; 26 L. J. [Q. B.] 296) and other cases show that, if it appears from the contract that the vendee has made the

ing and doing all the other acts necessary to be done to pass the property, the property in the goods will pass so soon as those acts are done. It is, however, observable that in *Aldridge v. Johnson* the bulk of the barley had been inspected and approved, and all that remained to be done was to sever and measure the portion to be appropriated to the vendee; and that the vendor had filled a number of sacks which had been sent by the vendee, thereby measuring it. The barley which was to be appropriated to the fulfilment of the contract was therefore severed from the bulk and measured with the assent of both parties. There could be no doubt that the property in the barley so dealt with passed. Mr. Lloyd sought to bring the present case within that by saying that a similar extensive authority was conferred by the defendant on the plaintiff in this case. I cannot draw any such inference from the facts proved here: on the contrary, I think they negative it. I cannot suppose that the defendant meant to part with the right of objecting to the correspondence of the hops with the sample, or of insisting on the weight being ascertained, before the property passed. It is true, there was an intimation to the warehouse-keeper that the two pockets numbered one and three had been sold to the defendant; but no transfer was made in his books, and he still held them at the charge and at the risk of the vendor. I think it is impossible for the court to draw the inference that an authority such as was given in *Aldridge v. Johnson* (7 El. & Bl. 885; 26 L. J. [Q. B.] 296) was given here; and if no such authority was given, the case is brought within the multitude of authorities in which it has been held that, where there is a sale of unascertained goods with reference to which something remains to be done by the vendor before delivery to the vendee, no property passes until that has been done.

BRETT, J. At the trial I proposed to nonsuit the plaintiff, on the ground that there was no evidence to go to the jury in support of the count for goods bargained and sold. It was not then suggested that there was any authority from the defendant to the plaintiff to select the two pockets for him. If it had been, I should not have nonsuited the plaintiff, but would have left that question to the jury. The question now is, not whether there was any evidence for the jury, but whether the court can infer from the facts proved, that the property in the two pockets of Thorpe's passed. It is clear that no property passed by the contract itself. The contract was for a sale by sample of unascertained hops, the price depending on the weight. Then comes the case put by my brother Blackburn in the passage at p. 127, to which I referred in the course of the argument. Here there was no previous authority given to the plaintiff to appropriate;

and, if not, what evidence was there to show that the appropriation of the two pockets in Prid & Son's warehouse was ever assented to by the defendant? The defendant's assent might have been given in either of two ways,—by himself, or by an authorized agent. By himself, after the receipt of the letter containing the invoice; or by the warehouse-keepers, if there had been any evidence of agency or authority in them to accept, and assent by them to hold the hops for him. I think the defendant's letter refusing to accept the draft was strong, if not conclusive, to show that there had been no such assent by the defendant. And, as to Prid & Son, the evidence fails on both points. They never agreed to hold the two pockets on behalf of the purchaser; and, if they did, there is no evidence of any authority from him that they might do so. Mr.

Lloyd has strongly put forward a point which was not made at the trial, viz., that there was evidence that, by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed; consequently the plaintiff cannot recover as for goods bargained and sold.

Rule discharged.

GILL v. DE ARMANT et al.

(51 N. W. 527, 90 Mich. 425.)

Supreme Court of Michigan. March 4, 1892.

Error to circuit court, Emmet county; Fred H. Aldrich, Judge.

Action in replevin by Charles N. Gill against Andrew J. De Armant and another. Plaintiff had judgment, and defendants assign error. Affirmed.

M. W. George, for appellants. B. T. Halstead, for appellee.

LONG, J. This is an action of replevin for one saw frame and carriage and appurtenances. The action was commenced in justice court in Emmet county. The writ was placed in the hands of the sheriff, who returned upon the writ that he had replevied the property, and delivered the same to the plaintiff, and also summoned the defendants to appear according to the mandate of the writ. The parties appeared on the return-day and joined issue; the defendants giving notice, under their plea of the general issue, that the property described was at the time the suit was brought a part and portion of certain described real estate. Plaintiff had judgment in justice court, finding the title of the property in him, and assessing his damages for detention at six cents. Defendants appealed to the circuit court, where the cause was tried before the court without a jury. The plaintiff, to maintain his action, was called as a witness, and testified that he was the owner of the property at the time of bringing the writ; that he found it in defendants' possession, and made demand for it, which was refused; that the property was formerly a part of a mill at Clarion, in Charlevoix county, and had been removed by the defendants, and put up in their mill at Petoskey. He offered in evidence: (1) An agreement in writing, made March 15, 1888, between himself and one Lille Messler, by the terms of which he agreed to sell to her an undivided one-half interest in the mill at Clarion, then owned by him, for a consideration of \$200. This included the property in controversy. One hundred dollars was to be paid at the signing of the agreement, and the balance, March 15, 1890. There was a stipulation in this agreement that in case default should be made in the payments the agreement should be null and void. There was paid on this contract \$137.38, March 31, 1888, and \$18.50, April 30, 1888. No further payments were made. (2) A contract made between himself and one Elizabeth Hass, July 2, 1889, by the terms of which he sold conditionally to her an undivided one-half interest in the mill for the sum of \$565. This also included the property in controversy. By the terms of this agreement \$52.50 was paid at its date, the balance to be paid in monthly installments of \$25. The title of the property was to remain in the plaintiff until fully paid for. October 29, 1889, Mrs. Hass paid \$25, and on December 14, 1889, she paid

\$115.19. These were all the payments made on that contract. The parties took possession of the mill under these contracts. It appears that the mill and property described in these contracts were partially destroyed by fire, and that the defendants, on April 28, 1890, purchased the property in controversy from James R. Hass, the husband of Elizabeth Hass, and who acted as her agent; he giving the defendants a bill of sale, the consideration expressed in it being the sum of \$65, which defendants paid. Mrs. Hass was in possession of the mill property at the time the bill of sale was given. The defendants took the saw frame and carriage and appurtenances, placed it in their mill at Petoskey, where it was bolted to the floor, and used by them in their business. Defendants' counsel objected to the introduction of these contracts in evidence, claiming that they did not tend to show title in the plaintiff. They were admitted. This constitutes defendants' first claim of error.

The plaintiff's counsel contended that the agreement with Lille M. Messler is an executory contract or agreement to convey upon condition that payments were made as provided, and that, the vendee having defaulted in the payments, the title to that undivided one-half interest never passed to her; that, by the express provisions of the contract with Elizabeth Hass, that undivided one-half interest never passed to her, and that, therefore, the title to that part of the property in controversy here still remained in him at the time the suit was brought. The court below so held, and, we think very properly. The contract with Mrs. Messler does not purport to be a conveyance of the title of the mill property, but an agreement that, upon certain conditions thereafter to be performed by her, he was to convey the title to her. These conditions were not performed, and therefore the title to that undivided one-half interest had not passed out of the plaintiff.

In the contract with Mrs. Hass the plaintiff expressly reserved the title in himself until full payment was made. These payments have not been made in full, so that the title to all of the mill property remained in the plaintiff at the time the defendants purchased from Mrs. Hass, through her husband. There was a considerable amount yet due to the plaintiff under both these contracts at the time the suit was brought; and the plaintiff was permitted to testify upon the trial, under defendants' objection, to the value of the property left at the mill, covered by these contracts, and not taken by the defendants. Defendants' counsel bases his second claim of error upon the admission of this testimony. There was no error in admitting it. It appears from this testimony, and the plaintiff had the right to show the fact, that the value of the whole property, including that taken by defendants, was no greater than the amounts remaining unpaid under these contracts.

The defendants' third claim was that the

property taken by them, and put in their mill at Petoskey, was so annexed to the realty that an action of replevin could not be maintained, as its removal from the mill would be an injury to the realty to which it was attached. The court below ruled that the property had not become so attached. We think the court was correct. It was property belonging to the plaintiff, taken by the defendants, and by them put in use in their mill. It was property capable of beneficial use, if set up in any other place. No agreement is shown upon the part of the owner that the defendants might so attach it; and the defendants, under the circumstances here stated, cannot be permitted to make such a claim. Personal property may become a part of real estate, where affixed to it, if such was the understanding between the parties; or it might remain personal estate, if the understanding to that effect was clearly indicated, or fairly deducible from the circumstances. *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899, and note; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Blancke v. Rogers*, 26 N. J. Eq. 563; *Voorhees v. McGinnis*, 48 N. Y. 278. Here the attempt is made to take the property of another, and to attach it to the realty, without the consent of the owner,

and then to assert that it is a part of the realty. The court below very properly held that this could not be done.

The court below, upon the presentation of the whole case, entered judgment in favor of the plaintiff. Complaint is made by defendants' counsel as to the form of this judgment. It appeared upon the trial that although the officer stated in his return that he had replevied the property, and delivered it to the plaintiff, the fact was that at the time of the service of the writ the officer did not remove the property from defendants' mill, or disturb it therein, but, by an arrangement between the parties themselves, it was agreed that the property should remain there pending the suit, until its value was determined. A bill of exceptions was settled in the case, but the cause was tried before the court without a jury, and there is nothing in the record showing that findings of fact or law were asked or made. The attention of the trial court, as appears from the record, was not called to the form of judgment entered; and it is raised in this court, for the first time, by an assignment of error. The judgment of the court below must therefore be affirmed, with costs.

The other justices concurred.

HOVEY et al. v. GOW.

(45 N. W. 985, 81 Mich. 314.)

Supreme Court of Michigan. June 6, 1890.

Error to circuit court, Muskegon county.

De Long & O'Hara, for appellants
Smith, Nims, Hoyt & Erwin, for appellees

CABILL, J. This was an action of replevin commenced by Hovey & McCracken, to recover a quantity of lumber, which in March, 1889, had been seized by the defendant as city treasurer of Muskegon, to satisfy a claim for taxes assessed against A. P. & W. E. Kelley Company of Chicago, on certain personal property of theirs situate in Muskegon, and liable to assessment there. The amount of the tax was something over \$1,000. The plaintiffs claim to be owners of the lumber in suit, and their claim is based upon the following contract made between them and A. P. & W. E. Kelley Company: "Muskegon, Mich., Nov. 20, 1888. A. P. & W. E. Kelley Co. have this day bought, and Hovey and McCracken have sold, one million feet selected Eaglehead lumber, now in cross-piles on McCracken, Hovey & Co.'s docks, in Muskegon, and one and one-half million feet additional to be cut from their Eaglehead logs, the number to be sorted and cross-piled as to quality same as above, that being sixty per cent. of the better lumber in the log. Hovey and McCracken guaranty to sort lumber, as follows: Forty per cent. of the coarsest by itself, and they are to retain it. The remaining sixty per cent. by itself for A. P. & W. E. Kelley Co. At the close of the present sawing season, C. S. Montague is to estimate lumber on dock, and determine as to the percentage as to sorting as above required. If sorted within two per cent. of above requirements, either way, then this contract is to be in force; if more than two per cent., it is at the option of the A. P. & W. E. Kelley Co. whether they take it or not; but they are to decide and notify the sellers within five (5) days after said estimation is made. The lumber is to be sawed and trimmed in a good and workman-like manner, and cross piled on McCracken, Hovey & Co. docks, and held until the spring of 1889 at the sellers' risk; all the lumber to be cross-piled loose, and the piles to have good pitch; all the piles to be covered and tied down, to shed snow and rain. The seller agrees to commence sawing at once on the one and one-half million feet yet to be sawed, and continue on same till the close of the present sawing season. In case the whole amount is not cut at that time, they will commence at the opening of navigation, in the spring of 1889, and complete the sawing of the same. The purchasers buy the above-mentioned lumber on the following terms: The lumber is to be settled for by the sellers' draft on the purchasers at such time, but not later than December 1st, 1888, as the purchasers may elect, not exceeding six months' time from December 1st, 1888; but the price must be eighteen and fifty one-hundredths dollars (\$18.50) net per thousand feet, and half tally to the seller, December 1st, 1888. Final settlement to be made when lumber is shipped, in spring of 1889. It is distinctly agreed that

this lumber belongs to the sellers until shipped, in spring of 1889, and when so shipped it is to be free of any insurance charges or taxes that may be assessed against said lumber. All mill-culls to be taken out when shipped, and lumber to be tallied by C. S. Montague. It is further mutually agreed between the sellers and purchasers that, in the event of the loss of any portion of this lumber by fire, the purchasers may elect whether the trade is to be considered off for that portion of the lumber so destroyed, and the money refunded that may be due them, with interest at seven per cent. from the time the money was actually paid, or the purchasers may have the right, if there are any logs of the same mark on hand, to have this lumber so destroyed duplicated by sawing the same amount and quality, in manner as before. In case there should be any lumber burned and no logs on hand to replace the lumber, the sellers are to refund to the purchasers to the amount of \$18.50 per thousand feet, and interest at seven per cent. for the amount so destroyed. A. P. & W. E. KELLEY CO. [L. S.] A. P. KELLEY, Pres. HOVEY & McCracken. [L. S.]"

The lumber replevied was a part of the same lumber covered by this contract, and was worth \$3,700. Mr. Hovey, one of the plaintiffs, testified, on cross-examination, that at the time this contract was made there was about 1,000,000 feet of the lumber sawed, and that they afterwards sawed five or six hundred thousand more; that it was not contemplated that any of this lumber was to be shipped until the spring of 1889; that the lumber amounted to \$46,250, according to the tally when shipped; that \$45,000 had been paid upon it before the defendant seized it; that at the time of the seizure all the lumber that had been sawed at that time was piled out for the Kelley Company; that the mark they had on it was "Eaglehead No. 1;" that he could not say whether it had "K" marked on it or not; the defendant seized eight piles of lumber, containing about 200,000 feet, out of fifteen or sixteen hundred thousand piled on the same dock; that all this lumber, including the 200,000 feet replevied, was finally shipped to the Kelley Company, who paid the plaintiffs the balance due on it. The regularity of the defendant's tax-roll and warrant, and the fact that it showed a personal tax against A. P. & W. E. Kelley Company for \$1,089.46, was conceded. The court directed a verdict for the plaintiffs, and the defendant brings error.

The single question involved is as to whether, under the contract between the parties, the title to this lumber had passed from the plaintiffs to A. P. & W. E. Kelley Company. By the contract it is distinctly agreed that the lumber should belong to the sellers until shipped, in the spring of 1889, and when so shipped to be free of any insurance charges or taxes that may be assessed against said lumber. Upon this record we are not concerned with any reasons or motives that may have influenced the parties in putting this provision into their contract. Whether it was to require the plaintiffs to pay the taxes that might be levied upon it does not appear. Nor

was it claimed that there was any unlawful or fraudulent purpose in putting such provision in the contract. It is not for the courts to make contracts between parties; they can only construe and enforce those that have been made. We see nothing ambiguous or doubtful about the meaning of this contract. We think it clearly and explicitly provided that the plaintiffs should be owners of the lumber until it was shipped. By another provision of the contract, the lumber was to be tallied by C. S. Montague, and a final settlement was not to be made until the lumber was all shipped. If it fell short of the esti-

mated quantity, there would be that much less money going to the plaintiffs. If they suffered the 200,000 feet seized by the defendant to be taken away and applied towards the payment of the A. P. & W. E. Kelley Company debt, they would not have been entitled to claim from A. P. & W. E. Kelley Company the value of that lumber at the contract price as though shipped. It was of importance, therefore, to the plaintiffs to reclaim this lumber so as to be able to ship it, as otherwise they must have lost the price of it. The judgment is affirmed, with costs. The other justices concurred.

MARVIN SAFE CO. v. NORTON.

(7 Atl. 418, 48 N. J. Law, 410.)

Supreme Court of New Jersey, Nov. 29, 1886.

On certiorari to Mercer common pleas.

On May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there, in the office of the prosecutors, executed the following instrument: "May 1, 1884. Marvin Safe Company: Please send, as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars (\$84.) seven dollars cash, and balance seven dollars per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said installments or notes, when same shall become due, then all of said installments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may, at their option, remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith. Samuel N. Schwartz, Mark: Samuel N. Schwartz, Hightstown, New Jersey, Route, New Jersey. Not accountable for damages after shipment." Schwartz paid the first installment of seven dollars, May 1, 1884, and the safe was shipped to him the same day. He afterwards paid two installments of seven dollars each, by remittance to Philadelphia by check. Nothing more was paid. On July 30, 1884, Schwartz sold and delivered the safe to Norton for \$55. Norton paid him the purchase money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe, and removed it to his office. Schwartz is insolvent, and has absconded. The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment on the ground that, the defendant having bought and paid for the safe bona fide, the title to the safe, by the law of Pennsylvania, was transferred to him.

Before Justices DEPUE, DIXON, and REED.

A. S. Appelget, for plaintiff in certiorari. S. M. Schanck, contra.

DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally; the vendor reserving the title, notwithstanding delivery, until the contract price should be paid. The courts of Pennsylvania make a distinction between

the bailment of a chattel, with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel, with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of that state hold that a bailment of chattels, with an option in the bailee to become the owner on payment of the price agreed upon, is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee and bona fide purchasers from him; but that, upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title in the vendor until the contract price is paid is void as against creditors of the purchaser, or a bona fide purchaser from him. *Clow v. Woods*, 5 Serg. & R. 275; *Enlow v. Klein*, 79 Pa. St. 488; *Haak v. Linderman*, 64 Pa. St. 499; *Stadtfeld v. Huntsman*, 92 Pa. St. 53; *Brunswick, etc., Co. v. Hoover*, 95 Pa. St. 508; 1 Benj. Sales (Corbin's Ed.) § 446; 21 Am. Law Reg. (N. S.) 224, note to *Lewis v. McCabe*. In the most recent case in the supreme court of Pennsylvania, Mr. Justice Sterrett said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that, in default of such payment, the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but, as to creditors, the latter is good, while the former is invalid." *Forrest v. Nelson*, 19 Reporter, 38, 108 Pa. St. 481. The cases cited show that the Pennsylvania courts hold the same doctrine with respect to bona fide purchasers as to creditors.

In this state, and in nearly all of our sister states, conditional sales—that is, sales of personal property on credit, with delivery of possession to the purchaser, and a stipulation that the title shall remain in the vendor until the contract price is paid—have been held valid, not only against the immediate purchaser, but also against his creditors and bona fide purchasers from him, unless the vendor has conferred upon his vendee indicia of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Cole v. Berry*, 42 N. J. Law, 308; *Midland R. Co. v. Hitchcock*, 37 N. J. Eq. 550, 559; 1 Benj. Sales (Corbin's Ed.) §§ 437–460; 1 Smith, L. C. (8th Ed.) 33–39; 21 Am. Law Reg. (N. S.) 224, note to *Lewis v. McCabe*; 15 Am.

Law Rev. 380, "Conversion by Purchase." The doctrine of the courts of Pennsylvania is founded upon the doctrine of *Twyne's Case*, 3 Coke, 80, and *Edwards v. Harben*, 2 Term R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud,—a doctrine repudiated quite generally by the courts of this country, and especially in this state, *Runyon v. Groshon*, 12 N. J. Eq. 85; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Miller v. Pancoast*, 29 N. J. Law, 256. The doctrine of the Pennsylvania courts is disapproved by the American editors of *Smith's Leading Cases* in the note to *Twyne's Case*, 1 Smith, Lead. Cas. (8th Ed.) 33, 34; and by Mr. Landreth in his note to *Lewis v. McCabe*, 21 Am. Law Reg. (N. S.) 224; but, nevertheless, the supreme court of that state, in the latest case on the subject,—*Forrest v. Nelson*, decided February 16, 1885,—has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that, upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him bona fide by a levy under execution or a bona fide purchase, will acquire a better title than the original purchaser had,—a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction, it must determine the rights of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. *Leonard v. Davis*, 1 Black, 476; 1 Benj. Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract, was thereupon complete.

The validity, construction, and legal effect of a contract may depend, either upon the law of the place where it is made, or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but, when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. *Frazier v. Fredericks*, 24 N. J. Law, 162; *Dacosta v. Davis*, Id. 319; *Bulkeley v. Hanold*, 19 How. 390; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124, 1

Sup. Ct. 162; *Morgan v. New Orleans, M. & T. R. Co.*, 2 Woods, 244, Fed. Cas. No. 9,804; *Simpson v. Fogo*, 9 Jur. (N. S.) 403; *Whart. Conf. Laws*, §§ 341, 345, 401, 403, 418; *Parr v. Brady*, 37 N. J. Law, 201. The contract between Schwartz and the company having been made and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz's title will be determined by the law of Pennsylvania. By the law of that state the condition expressed in the contract of sale, that the safe company should not relinquish title until the contract price was paid, and that on the failure to pay any of the installments of the price the company might resume possession of the property, was valid, as between Schwartz and the company. By his contract, Schwartz obtained possession of the safe, and a right to acquire title on payment of the contract price; but until that condition was performed the title was in the company. In this situation of affairs, the safe was brought into this state, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe, was made at Hightstown, in this state. The property was then in this state, and the contract of purchase was executed by delivery of possession in this state. The contract of purchase, the domicile of the parties to it, and the situs of the subject-matter of purchase were all within this state. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase, and the rights of the purchaser under it, are determined by the law of this state. By the law of this state, Norton, by his purchase, acquired only the title of his vendor,—only such title as the vendor had when the property was brought into this state and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the safe company, that, therefore, his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the safe company to the rights of a bona fide purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the safe company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain title against the safe company, Norton must build up in himself a better title than Schwartz had. He can accomplish that result only by virtue

of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts, that a reservation of title in the vendor upon a conditional sale is void as against creditors and bona fide purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that state. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud, and a forfeiture of the vendor's reserved title as in favor of creditors and bona fide purchasers. The doctrine is founded upon consideration of public policy adopted in that state, and applies to the fact of possession and acts of ownership under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract.

In *McCabe v. Blymyre*, 9 Phila. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid, though the mortgagor retained possession. The chattel was afterwards brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the state where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that state; that the mortgagee, by allowing the mortgagor to retain possession of the property, and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right, under the mortgage, as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that state. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another state, as against a bona fide purchaser who had bought the property of the mortgagor in this state, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this state. *Parr v. Brady*, 37 N. J. Law, 201.

The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect.

In the case in hand, the safe was removed to this state by Schwartz as soon as he became the purchaser. His possession, under the contract, has been exclusively in this state. That possession violated no public policy,—not the public policy of Pennsylvania, for the possession was not in that state; nor the public policy of this state, for in this state possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this state, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this state; for by the law of Pennsylvania creditors and bona fide purchasers are put upon the same footing. Neither on principle, nor on considerations of convenience or public policy, can such a right be conceded. Under such a condition of the law, confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the situs of which is in this state, would depend, not upon our laws, but upon the laws and public policy of sister states or foreign countries. A purchaser of chattels in this state which his vendor had obtained in New York, or in most of our sister states, under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the state of Pennsylvania. Whatever might impair that title—the continued possession and exercise of acts of ownership over it by Schwartz, and the purchase by Norton—occurred in this state. The legal effect and consequences of those acts must be adjudged by the law of this state. By the law of this state it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this state, Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which by our law will give him a better title.

The judgment should be reversed.

LASSING v. JAMES. (No. 15,637.)

(40 Pac. 534, 107 Cal. 348.)

Supreme Court of California. May 28, 1895.

In bank. Appeal from superior court, city and county of San Francisco; A. A. Sander-son, Judge.

Action by J. F. Lassing against J. G. James on a contract to pasture and feed cattle. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

W. C. Graves, for appellant. Edward P. Cole and T. C. Law, for respondent.

GAROUTTE, J. The plaintiff, Lassing, was a farmer, and the owner of several fields of growing alfalfa. He was also the owner of nine stacks of hay, amounting to about 2,700 tons, which hay was situated in these various fields. Defendant, James, was the owner of a large number of cattle, and was desirous of securing both pasturage and hay upon which to feed them. Thereupon a written agreement was entered into between these two parties, which, among other things, contained the following covenants: "That the said party of the first part (Lassing), in consideration of the covenants, promises, and agreements on the part of the said party of the second part (James), hereinafter contained, hereby covenants, promises, and agrees to and with the said party of the second part that the said party of the first part will take onto his inclosed alfalfa fields cattle aggregating about 800 to 1,200 head, to be pastured at 90 cents per head per month. If any cattle should remain on said pasture any fractional part of any month, pasturage shall only be paid proportionately, and, when the pasturage becomes exhausted as not to fatten said steers, and some hay is fed, then the price is to be on the pasturage as the quantity of hay is fed, allowing 28 pounds of hay for a full 24 hours' feed for each head; for instance, if 14 pounds of hay is fed per day, then 45 cents per month per head is to be paid, and pro rata more or less in that proportion, as the case may be, until the cattle are entirely confined to the feeding pens, and \$5 per ton is to be paid for each and every ton of hay fed between this day and April 1, 1890. And the first party agrees to fence off around each bunch of stacks a sufficient number of large feeding pens, and sufficiently strong to hold the cattle without fear of them getting away; also, to furnish a good, comfortable, dry house for the use of the men engaged in feeding and caring for said stock; also, to furnish a good supply of water troughs in each pen, with pipes, etc., from the tanks, wells, and pumps, to be equipped and furnished in good order, and sufficient to plentifully water all of said cattle at all times, and, if it is found necessary to save hay while feeding, feeding racks are to be made around the fence. Cattle may be taken out and others put in at any time.

And the said party of the second part, in consideration of the said covenants, promises, and agreements on the part of the said party of the first part hereinafter contained, covenant, promise, and agree to and with the party of the first part that the said party of the second part will, on turning cattle on said alfalfa fields, pay \$2,500 as the first payment on the hay, and at the end of each and every month pay the amount of all the pasturage used during the months just past. On or before November 1, 1889, both of the parties hereto is to cut off ten feet from the end of an average stack, and weigh it, and average the balance by that, and, as soon as the amount is found, one-half of all the money it comes to is to be paid, and seventy-five days thereafter one-half of the balance due is to be paid, and at the end of the time all is to be paid." In pursuance of the aforesaid agreement, James placed his cattle upon the fields of Lassing, where they remained about six weeks, when he removed them therefrom, and declined to be further bound by the terms of the contract. This action was brought by Lassing to recover the value of the hay at \$5 per ton, and also the price of the pasturage as agreed upon. The plaintiff credited defendant with the payment of \$2,500, made at the time the contract was entered into, and also allowed him the further sum of \$3,423, paid to plaintiff by an insurance company for a loss of a portion of the hay by fire, plaintiff having taken out a policy thereon after James removed his cattle from the premises. In addition to the denials of the answer, defendant set out a cross complaint, claiming damages to the amount of about \$6,000 for injury to the cattle by reason of plaintiff's breach of agreement in the manner in which he cared for them. The cross complaint was held to be unsupported in the evidence by the trial court, and judgment went for plaintiff. This is an appeal from such judgment and from the order denying a motion for a new trial.

There is no question raised by appellant, James, as to the amount allowed by the court for pasturage of the cattle, but the chief bone of contention appears to be as to the amount of hay that James really purchased; and that brings us to a construction of the agreement itself. It is contended, upon the one side, that James was only to pay for the hay used in feeding his cattle; while it is insisted, upon the other, that James bought the entire nine stacks of hay, and that his liability to pay therefor was incurred whether or not the hay was actually fed to the cattle. Upon the face of the contract there seems to be some inconsistency as to its provisions in this regard. In one part it is provided that "five dollars per ton is to be paid for each and every ton of hay fed between this date and April 1, 1890"; while the last clause provides in terms for the measuring of the entire nine stacks of hay for the purpose of determining the number of tons therein, and

further provides for partial payments therefor, and the respective times when such payments are to be made, and also fixes the date of final payment of the balance due. The contract is ineffectually drawn, and from all points indicates the handiwork of a layman. At the same time the inconsistency or repugnancy present in the two portions of the contract cited is more seeming than real. These two provisions are certainly not directly conflicting. James, as indicated by the first clause quoted, agreed to pay for all the hay used prior to April 1, 1889. The second clause quoted is simply broader, and reaches further, for by that clause he agrees to pay for all the hay in the nine stacks. Section 1858 of the Code of Civil Procedure, in speaking as to the interpretation of contracts, provides that: "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all,"—and by virtue of this canon of construction we avoid a seeming contradiction in these two provisions, and allow them both to stand. There are also provisions of the Civil Code which, when applied to the facts here presented, overthrow appellant's position as to the true construction of this contract. Section 1639 provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." If James' promises of payment, when taken together, are ambiguous and uncertain, then, under the oral evidence of Lassing, there is no question but that both parties understood that James was buying all the hay at \$5 per ton. Lassing not only believed such to be the contract, but James, the promisor, believed Lassing, the promisee, so understood it. These conditions are conclusively shown by Lassing's testimony, and James, when upon the witness stand, in no way offered contradictory evidence. Section 1654 of the Civil Code provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * * James is the promisor, and, by virtue of this section of the Code, he is presumed to be the party who caused the uncertainty; but, beyond this, he was the party who actually caused it, for he prepared the contract, and therefore it should be interpreted most strongly against him. Again, section 1640 provides: "When through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." We think the provisions of this section may be properly invoked in behalf of respondent's contention. James prepared the written contract in San Francisco, and brought it to Lassing at his home for him to sign. At that

time the contract did not contain the provision providing for the measurement of the hay, and the partial payments therefor according to the number of tons found to be in the stacks, but it contained a provision providing for the payment of all the hay used, at the rate of \$5 per ton. The contract thus presented to Lassing he refused to sign, insisting that James should take all the hay, or none. Thereupon James, in compliance with Lassing's demands, erased from the contract as presented the provision as to paying for the hay used, and added thereto the provision as to taking all the hay. It now appears that a provision of general similar import to the one erased still remained in another portion of the contract; but the circumstances all show that it was an oversight upon the part of both parties in not also striking that provision from the contract, and it is evident that it was omitted to be done purely through mistake. It was not intended to be left there, and, tested by section 1640, should be disregarded in the interpretation thereof.

The facts and circumstances surrounding the making of this contract appear in the record by the uncontradicted evidence of the respondent, Lassing. Appellant, in his reply brief, strenuously attacks the rulings of the court in admitting this evidence. It is claimed that such parol evidence was inadmissible as tending to contradict, add to, and vary the terms of the written contract. But we are clear to the contrary. The contract has not been changed by Lassing's evidence. Nothing has been added thereto. No term has been nullified or even modified. The sections of the Code we have quoted relating to the construction and interpretation of contracts contemplate the introduction of parol evidence. For it is only upon the introduction of such evidence that it can be ascertained whether or not the principles of law embodied in these sections are pertinent and applicable to the facts of any particular case. We conclude that appellant agreed to take all the hay situated in the nine stacks. The clause of the contract as to the measurement of the hay and the payment therefor is as follows: "On or before November 1, 1889, both of the parties hereto is to cut off ten feet from the end of an average stack, and weigh it, and average the balance by that, and, as soon as the amount is found, one-half of all the money it comes to is to be paid, and seventy-five days thereafter one-half of the balance due is to be paid, and at the end of the time all is to be paid." Appellant contends that this clause, standing alone, is simply an executory agreement for the sale and purchase of all the hay in the nine stacks, and that, consequently, the title to the hay has never passed to James. It is insisted that the contract was executory in this, that the hay was never measured and the amount ascertained, as provided in the contract, and that the measurement and de-

termination as to the amount were conditions precedent to the passing of the title. We are clear that the agreement to ascertain the number of tons of hay at some future time by weight and measurement in no way affected the question as to the present passing of the title. All the hay in the nine stacks was purchased, at the rate of \$5 per ton. The number of tons was immaterial as bearing upon the question of a valid transfer. The final determination as to the number of tons was only material as fixing the amount of money to be paid. The subsequent measurement and ascertainment of the exact number of tons could in no way furnish any grounds for the rejection or repudiation of the sale by either party. The hay was identified and the price per ton agreed upon at the date of the contract, and these only were the essentials necessary to constitute a valid sale, for the sale was made regardless of the amount of the hay, and thus necessarily became complete and perfect when the contract was entered into and part payment made thereunder. In *Blackwood v. Packing Co.*, 76 Cal. 212, 18 Pac. 248, a case involving the principle here discussed, this court said: "Some of the American cases are not in accord with the rule laid down by Mr. Benjamin in this, that, if the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity, and this seems to be the law in California, for the Civil Code contains the following: 'Sec. 1149. The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.'" After James repudiated the contract, removed his cattle from the fields, and left the hay in the stacks, appellant contends that it was the duty of Lassing to sell the hay to the best advantage possible, and, if it failed to bring \$5 per ton, then the right accrued to recover from James the difference. In a case like the present, where the title to personal property has passed, there is no obligation resting upon the vendor to resell. In many cases he would have no right to resell, and possibly would be guilty of an act of conversion if he exercised any such dominion over the property; but upon the facts of this case, under any principle of law which appellant might advance, Lassing had the right to choose his remedy, as between suing for the entire purchase price or selling the property and bringing an action for the difference in case the sale resulted in a loss. *Hunter v. Wetsell*, 84 N. Y. 555; *Dustan v. McAndrew*, 44 N. Y. 72; *Van Horn v. Rucker*, 84 Am. Dec. 53.

It is insisted that Lassing so materially failed to carry out the covenants of the contract upon his part to be performed that James was justified in repudiating the contract and withdrawing from under its provisions. Of course, such conduct upon the

part of James could only be justified upon the principle that the covenants to be performed by the respective parties were entirely mutual and dependent upon each other. And, in view of what we have already said as to the purchase of the hay, possibly James' only remedy for a breach of the contract would be an action of damages in the nature of a recoupment; but we do not deem it necessary to enter into a discussion as to the mutuality and dependency of these respective covenants, for we think no material and substantial breach of the contract was ever committed by Lassing. By its terms he was to do various things, and in pursuance of his agreement it is conceded that he performed all of the things to be done by him, and at considerable labor and expense, except in a single respect. The contract, after requiring Lassing to furnish a plentiful supply of water for the cattle, continues: "And, if it is necessary to save hay while feeding, feeding racks are to be made around the fence." It is now claimed that Lassing failed to live up to his contract in this regard, and the alleged breach of this provision of the contract is relied upon to furnish material sufficient to demand a reversal of the judgment. Upon this issue the court made the following finding of fact: "That it was never found necessary on the 18th day of October, 1889, or at any time, to furnish feeding racks around the fence to save hay while feeding the cattle of defendant, nor was any necessity for feeding racks ever known to plaintiff, nor did plaintiff wholly or at all omit, fail, neglect, or refuse to furnish the same, nor was defendant compelled to, nor did he, remove any of his cattle from plaintiff's land or premises because of the failure of plaintiff to build said racks, nor did defendant, nor was he compelled to, remove any of his cattle by any act of plaintiff, nor did defendant suffer any loss, injury, or damage in any sum of money by any act of plaintiff, or by any absence of feeding racks, or at all." As to its indefiniteness, the foregoing covenant of the contract stands fully at par with the other provisions, but, conceding to it all the force and effect that appellant claims, and that the provision not only demanded that Lassing should furnish feeding racks when necessary, but that a mistake in judgment upon his part as to the time when that necessity arose would furnish grounds for a repudiation of the contract upon the part of James, however innocent Lassing might be in making such mistake, still the finding of fact which we have quoted stands as a bar to a favorable conclusion to appellant upon this contention. The finding in effect declares: (1) It was never necessary to furnish the feeding racks; (2) that appellant did not remove his cattle from plaintiff's lands because of the failure to furnish said feeding racks; (3) that appellant suffered no loss or damage by reason of the absence of such racks. This finding of fact, as we look

upon it, in each of its particular branches is fatal to appellant's claims, if supported by the evidence; for, aside from that portion of the finding declaring in effect that racks were not necessary, it is found from the evidence that James deserted the premises and removed his cattle therefrom for other causes,—causes in no way attributable to Lassing, and for which he was in no way responsible. If this portion of the finding be true, then James cannot now rely upon a breach of the contract as a ground for repudiation which in his mind at the time in no way formed an element entering into the attempted repudiation or rescission upon his part. Again, it is found that he suffered no loss or damage as to his cattle by reason of the failure of Lassing to furnish the racks. If this be so, James was not excused in law from carrying out all the covenants upon his part to be performed. If, in fact, he suffered no injury or damage by a breach of the contract, such breach was harmless, and gave him no cause of complaint. Certainly no action of damages could be based thereon by him; neither would it be such a substantial default as to afford grounds for a rescission or repudiation. While upon some of these questions there may be said to be a substantial conflict in the evidence, yet we think every branch of this finding of fact has substantial support in the evidence found in the record. It will be observed that feeding racks were to be furnished when it became necessary "to save hay." Hence, it is evident that a breach of this provision could only result in damage to James for a loss of hay. Yet he makes no claim in his complaint for a loss of that character, but attempts to recomp in damages for a loss of weight in the cattle by a lack of sufficient pasturage and hay. As to damages claimed in the nature of recompment, it would almost seem conclusive against the claim to such that there is nothing whatever in the contract requiring Lassing to furnish sufficient feed to keep the stock in prime condition. When the contract was made, the feed was upon the ground, both pasturage and hay, and it was James' feed, regardless of quality or quantity, and was to be fed by him at such times and quantities as he saw fit. There is some claim that James subsequently, by parol, made Lassing his agent to take charge of the cattle and care for them. Conceding as much, a neglect of duty by Lassing under such contract, and damages resulting therefrom, would be a matter entirely foreign to any question of feeding racks. In addition to and beyond all this, the evidence fully supports the finding that the lack of feeding racks in no way was the cause of damage and loss to James, conceding such damage and loss to have occurred. Again, the finding of fact to the effect that the absence of feeding racks was not the cause of the removal of the cattle by James finds ample support in the evidence. Owing to the warm, copious, and unexpected rains

of the months of September and October, the fields had become soft and miry, which fact interfered largely with the welfare of the cattle, and furnished a strong argument for James' action in removing them. And, as an additional cause for their removal, and probably the controlling one, these same warm rains had caused a growth of grass upon James' own land fully sufficient for all his needs and purposes.

Conceding that an error of judgment upon Lassing's part as to the date when he was required to furnish the racks is fatal to his case, still, under the evidence, the finding of the court to this point has support. A mistake of judgment as to this particular time, entailing upon him the severe penalties here claimed, should not be held against him unless clearly apparent from the evidence. We think his conduct and acts in this regard should be liberally interpreted in his favor; and, so interpreted, we conclude the breach, if one occurred, was not a substantial one, but purely technical. Weeks before the cattle were removed Lassing had made arrangements with a dealer to have the lumber upon the ground to build the racks upon 24 hours' notice. He had fed the hay for two days only when James came upon the ground and ordered an immediate removal of the cattle. Under the written contract, it is clearly contemplated that James should feed the hay, and the inference naturally arises that Lassing would be notified when racks were required, but, under a subsequent parol agreement, Lassing was hired to feed the hay, and, as stated, he had only fed it two days when James came upon the ground and ordered an immediate removal of the cattle. It thus appears to have been left to Lassing alone to determine when hay should be fed, and for this reason the novel conditions arise that, if Lassing had decided not to feed hay during these few days, then the feeding racks would not have been required, and no breach would have occurred. Lassing states that he placed the hay upon the high and gravelly ground; that he did not think the time had arrived for the racks to be used; that neither James nor any of his men had requested or suggested to him to make and place them; that, immediately prior to the removal of the cattle, James neither demanded that he furnish the racks, nor notified him that he was removing the cattle for the reason that they were not furnished, and that he could and would have furnished them within a very few days if James had so requested. Upon such a state of facts we think this portion of the finding of the court should be upheld.

For the foregoing reasons we conclude the judgment and order should be affirmed, and it is so ordered.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

WIND et al. v. ILLER et al.

661 N. W. 1001.

Supreme Court of Iowa. Jan. 21, 1895.

Appeal from district court, Mills county; N. W. Macy, Judge.

Action at law to recover money paid by plaintiff to defendants for intoxicating liquors during the years 1881, 1882, 1883, and 1884. There was a trial to a jury, and at the conclusion of plaintiff's evidence, defendants moved the court for a verdict. The motion was sustained, and verdict and judgment rendered for defendants, and plaintiff appeals. Affirmed.

E. R. Duffie, John P. Breen, and John Y. Stone, for appellant. Congdon & Hunt, James M. Woolworth, and Smith McPherson, for appellees.

DEEMER, J. Plaintiff is a copartnership composed of N. P. Wind and George F. Silvers, heretofore, and during the years 1881, 1882, 1883, and 1884, doing business as wholesale and retail liquor dealers in the city of Ottumwa, Iowa. Defendant Iller & Co. is a copartnership composed of the other defendants, doing a wholesale liquor business in the city of Omaha, Neb. Sometime during the latter part of the year 1881 defendants' traveling man, one Gilmore, called upon the plaintiffs at their place of business in Ottumwa to induce them to order some liquors from the firm which he represented. The evidence shows without conflict that this agent had no authority to make sales. He had power to take orders, which were submitted to the defendants for their rejection or approval, and, if approved, the goods ordered were shipped to the proposed purchaser. Plaintiffs gave this agent an order for some goods, which was submitted to the defendants, and by them approved, and the liquors were delivered to the railroad company for shipment to plaintiffs at Ottumwa, plaintiffs paying the freight thereon. An arrangement was made between the plaintiffs and defendants' agent by which plaintiffs might thereafter order such liquors as they desired by mail or by telegram, and in accordance with this arrangement they ordered large quantities of liquor, which they paid for through the Ottumwa banks in response to drafts made upon them for the purchase price. All liquors so paid for, except three bills, were ordered by wire or mail. It is claimed by the plaintiffs that all these various sales of liquor, amounting in number to about 80, and in value to more than \$2,000, were unlawful and that they are entitled to recover all payments made thereon, under Code, § 1559, which provides that all payments made for intoxicating liquor sold in violation of our liquor law shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a

valid promise of the receiver to pay to the person furnishing such consideration the sum thereof.

The first question which arises is, were the sales made in this state? From what we have already stated it would appear that the sales were each and all made in Nebraska. But plaintiffs contend that, while the defendants' agent may have had no authority to do more than take their orders for the goods, yet there is testimony tending to show that the liquors were all shipped subject to their approval, and that the title to the goods did not pass until the liquors were received and tested by them. The testimony on this point is as follows: Witness George W. Silvers said, in substance, that Gilmore, the agent, said: "If the goods isn't satisfactory after you receive them, you can send them back to Omaha." And Silvers told him (Gilmore) if the goods were not as he said they should come back. "The goods came, and we inspected them,—gauged them. We had a government gauge there,—a thermometer we called a 'tester.' We tested the goods before we paid the freight," Gilmore said. "If you receive the order all in good shape, and the goods are satisfactory, and you need any more, and I am not around, why, send your orders in to the house, and they will be filled." This witness further testified that when the goods came to the depot at Omaha they were taken by a drayman from the freight house, and delivered at plaintiffs' place of business, the drayman paying the freight in the first instance, and afterwards collecting it from the plaintiffs. Witness further testified that one bill of goods which plaintiffs ordered shipped to Des Moines, to a customer of theirs at that place, was returned, and credit asked of defendants therefor, and that defendants gave them a small discount on one of their bills. He further said: "If they were not satisfactory, they were to be returned. That was the contract. We never returned any from Ottumwa." Witness Wind testified that Gilmore said: "If his goods were not as represented we had the privilege of returning them. We told him we wanted to examine the goods after they came, and see if they suited us. He said we had that privilege." "We had a gauge or whisky tester that we used. We took out the bung, and took a little out, and used the tester. We told Mr. Gilmore our method of examining it. He said it was satisfactory." Witness Silvers also testified that within three or four days after giving the order the plaintiffs received a bill for the goods, and entries were then made on the plaintiffs' ledger of the amount of the bill. It is an elementary proposition of law, needing no citation of authority in its support, that title passes in the sale of personal property when from all circumstances surrounding the transaction it is evident that the parties to the sale intended it to pass. It is wholly a question of intention to be arrived

at from the contract and the acts and conduct of the parties thereto. In the absence of all stipulations and conditions in the contract, the title will be presumed to pass, when the parties live at different places, when the goods are delivered by the seller to a transportation company for carriage to the buyer, subject to the seller's lien or right of stoppage in transitu. This is certainly the rule where the buyer is to pay the freight. It is also a general rule that the buyer has a right to inspect unascertained goods to determine whether they are such as are bargained for or not. *Newm. Sales*, § 252; *Benj. Sales* (Bennett's Ed.) pp. 639-639; *Hirshhorn v. Stewart*, 49 Iowa, 418. This right of inspection, however, does not of itself postpone the passing of the title. It simply authorizes a rescission of the sale in the event the goods are not as contracted for. So that the reservation of the right to inspect the goods by the plaintiffs in this case does not of itself indicate that title was not to pass until the goods were tested, for it gives to plaintiffs no greater rights than they would have had under the law without such reservation.

It is claimed that by the terms of the contract the title was not to pass until the plaintiffs were satisfied, after testing the liquors, that they were the kind ordered. The law has made a somewhat refined, yet no less obvious, distinction between an option to purchase if satisfactory and an option to return if not satisfactory. In the one case title will not pass until the option is determined, and in the other case the property passes at once, subject to the right to rescind and return. The former may be said to be a conditional sale, and the latter has been denominated a "sale or return." *Hunt v. Wyman*, 100 Mass. 198; *Foley v. Febrath* (Ala.) 13 South. 485; *Newm. Sales*, § 310; *Beswell v. Bickn II*, 17 Me. 344; *Benj. Sales* (Bennett's Ed.) p. 569, and cases cited. It is also well settled that the rule that title does not pass so long as anything remains to be done to the goods to ascertain their value, quality, or quantity, is only applicable to cases of constructive delivery. *Bogy v. Rhodes*, 4 G. Greene, 133. Under this rule the right reserved to plaintiffs to inspect and test the goods after they came into their actual possession would not operate to postpone the transfer of title, but merely gave them the right to rescind the contract and return the goods. See, also, in this connection, *Foley v. Febrath*, supra, and cases therein cited; 2 Kent, Comm. 496. We are satisfied from the fact that the drayman, who must be considered as plaintiffs' agent, paid the freight on these liquors, took them from the carrier, and delivered them to plaintiffs, and from the further fact that the plaintiffs credited defendants with the liquors as soon as they received the bills for them, which was in advance of the delivery of the goods, with the understanding that they were to have credit for such as might be returned,

that both parties intended title to pass when the goods were delivered to the railroad company at Omaha, Neb., for transportation to Ottumwa; and that the sale was not one on trial or on approval, or if satisfactory to plaintiffs, but rather a completed sale, with an option in plaintiffs to return them if they did not meet the test plaintiffs proposed to give them. Our conclusions find support in the following cases: *Eggs v. Priest*, 65 Iowa, 232, 21 N. W. 580; *Whitlock v. Workman*, 15 Iowa, 351; *Tegeler v. Shipman*, 33 Iowa, 194,—and are not in conflict with *Gipps Brewing Co. v. De France* (Iowa) 58 N. W. 1087, and *Tolman v. Johnson*, 43 Iowa, 127. The following cases from other states are directly in point: *Schlesinger v. Stratton*, 9 R. I. 578; *Mack v. Lee*, 13 R. I. 293; *Gill v. Kaufman*, 16 Kan. 571; *McCarty v. Gordon*, 1d. 35; *Snider v. Koehler*, 17 Kan. 432; *Dolan v. Green*, 110 Mass. 322; *Abberger v. Marrin*, 102 Mass. 70; *Boothby v. Plaisted*, 51 N. H. 436. If the sales were made in Omaha, then they were not unlawful in such sense as that recovery can be had for money paid thereon, although there is evidence in the record that defendants' agent knew plaintiffs had no permit to sell liquors in this state,—which they were at that time required to have to make lawful sales. It is no doubt true that if a nonresident makes sales of liquors in another state to a resident of this state, for the purpose and intent of enabling the purchaser to violate the liquor laws of this state, or participates or assists in a design on the part of the purchaser to dispose of them unlawfully in this state, his complicity in the illegal scheme will prevent him from recovering the price in an action against the purchaser. *Davis v. Bronson*, 6 Iowa, 410; *Whitlock v. Workman*, 15 Iowa, 351; *Bank v. Curren*, 36 Iowa, 555. And it is also true that, while mere knowledge on the part of the vendor that the purchaser intends to violate the law may not vitiate the sale, yet it is a fact from which the jury might infer an intent to violate such law. *Tegeler v. Shipman*, supra. Such unlawful participation in the illegal design of the purchaser will defeat an action by the seller to recover the purchase price of the liquors sold on the grounds of public policy. But will it enable the purchaser to recover the amount of payments made on the contract under section 1550 of the Code? We think not. The sale in such case is not unlawful under this statute, for, as we have already seen, the nonresident has a perfect right to make the sale in his state, and recover the purchase price. His act is unlawful because the policy of the law forbids his participation or assistance in the violation of our laws by the purchaser of the liquors, and on the grounds of public policy he cannot recover. The statute referred to gives the purchaser the remedy of recovering back his payments when the sale is of intoxicating liquors in violation of the liquor laws of this state. It is clear, then, that if the matter

had been submitted to the jury, and it had found that defendants, in making the sale in Omaha, intended thereby to enable plaintiffs to violate the law of this state, there could be no recovery under section 1550 of the Code. It must be remembered in this connection that all purchases and payments thereon for which recovery is sought in this action were made prior to the enactment of what is known as the "Wilson Bill," and it should further be borne in mind that under the decisions of the United States supreme court in *Brown v. Maryland*, 12 Wheat. 419; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; and *Leisey v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681,—sales like those in question, if made in Omaha to a resident in this state, were perfectly lawful in and of themselves. See, also, *Richards v. Woodward*, 113 Mass. 285. The statutes of this state regulating and licensing the traffic in liquors therein were void, and of no effect, so far as they interfered with commerce between the states. *Lyng v. Michigan*, 10 Sup. Ct. 725. So that defendants had the right to sell their liquors for importation into this state without reference to our police regulations. The sales in and of themselves were not unlawful.

Let it be conceded, however, for the purposes of this case, that the sales of the liquor took place at Ottumwa, and that payments were made for it there. What, then, is the state of the case? Defendants insist that if this be true, then, as the sales were made in the original package in which the liquors were imported, section 1550 has no application to them, because it is a regulation of commerce between the states, and is unconstitutional under the cases from the supreme court of the United States before quoted. We are well satisfied that defendants' contention is correct. Indeed, it is practically conceded by the plaintiffs' counsel. But they insist that as soon as the barrels were opened for the purpose of testing the property became incorporated into the general mass of property in the state, and subject to the police regulations adopted to preserve the health and morals of the community. That section 1550 was adopted to restrain the traffic in intoxicants, and to aid in the general enforcement of the general liquor laws of the state, in virtue of the police power lodged in the state, cannot be doubted. And, if this be true, it is a direct restraint and interference upon trade and traffic in liquors, and, under the decisions before quoted, it is, or was prior to the enactment of the Wilson bill, unconstitutional so far as it relates to commerce between the states or the inhabitants thereof.

This doctrine finds support in the cases of *State v. Coonan*, 82 Iowa, 400, 48 N. W. 921, and *State v. Corrick*, 82 Iowa, 451, 48 N. W. 808. What is said to the contrary in the case of *Connolly v. Scurr*, 72 Iowa, 223, 33 N. W. 641, which was decided prior to the case of *Leisey v. Hardin*, must be considered as overruled. It is our duty to follow the decision of the highest tribunal in this country—the final arbiter on these grave constitutional questions—without reference to the fact that there is a strong dissent to the doctrines announced by that court, which many of us think announces the better rule. The question, however, is of little importance at this time, because of the enactment of the Wilson bill, which fortunately gave to the states the right to exercise the police powers vested in them, without reference to the interference the exercise of those powers might have upon interstate commerce.

The question yet remains, did the drawing of the bang in the barrels in which the liquors were shipped into the state have the effect claimed for it by the appellants? We think not. The barrel was opened in order that a small quantity might be taken from it and tested,—not used,—in order to determine whether the liquors would be returned or not. We do not think that the inspecting or testing of an imported article to determine whether it shall be returned has the effect to make it a part of the general mass of property in the state. Plaintiffs, according to their theory, tested it to see if they would accept it, and make it their property. And if the mere act of testing made it theirs, there was no necessity for the test, because it became theirs by the act itself. We do not think they want such a rule applied in this case. In *Leisey v. Hardin*, supra, it is said: "Under our decision in *Bowman v. Railway Co.*, supra, they had the right to import this beer into the state, and in the view we have expressed they had the right to sell it, by which act alone it would be commingled with the general mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure." This court is committed to the doctrine that the size or form of the package has very little to do with the question we are now considering. The point has been made to turn rather upon whether the liquors themselves were imported or not than upon the form or inviolability of the package. *Collins v. Hills*, 77 Iowa, 181, 41 N. W. 571; *State v. Coonan*, supra. We are well satisfied with the conclusions reached by the lower court, and the judgment is affirmed.

GIBBS v. BENJAMIN.

(45 Vt. 124.)

Supreme Court of Vermont, Montpelier, Nov., 1872.

*Book account. The facts reported by *125 the auditor sufficiently appear in the opinion of the court. The court at the March term, 1871, Rutland county, WHEELER, J., presiding, rendered judgment on the report for the plaintiff for the price of the wood sued for. Exceptions by the defendant.

R. C. Abell, for plaintiff. Joseph Potter and Edgerton & Nicholson, for defendant.

REDFIELD, J. This action is book account to recover the price of cord wood alleged by the plaintiff to have been sold the defendant in April, 1869. Most of the wood was piled on the margin of Lake Champlain, on plaintiff's farm, in Benson, in this state. Two small parcels of the wood were on the opposite shore of the lake. About a week after the negotiation (which plaintiff claims was a sale), the wood was carried away by the flood of the lake, and lost. The report of the auditor gives a minute detail of every incident of the negotiation, and submits them to the court to interpret their legal effect.

*127 *The parties met at the instance of the plaintiff, and inspected the wood; after some discussion, it was agreed that the defendant should purchase the wood at \$3.50 per cord, the defendant insisting that a portion of it was less than four feet in length, and that some abatement should be made for such deficiency; to which the plaintiff did not assent. It was a part of the agreement, that the parties should meet and measure the wood, and accordingly, on the 19th day of April, 1869, they proceeded to measure the several piles of wood, each taking memoranda of the measurement as it proceeded. The defendant measured the length and still claimed some abatement therefor. The plaintiff insisted that by the terms of the agreement, the wood was to be assumed to be four feet in length. "As it was getting dark when the measurement was completed, the parties went home, each with the figures for having a computation of the quantity of wood made therefrom"; and both parties expressed their inability to make the computation at the time. On the 21st of April, the defendant, with his son, went to the plaintiff's house, to see if they could agree about the quantity of wood that had been measured. The plaintiff had computed the quantity of wood at 204 cords and some feet; "but, by mistake, had omitted one pile, containing some 60 cords." The defendant informed the plaintiff that he made the quantity 246 cords, after abating five inches for deficiency in the length of some portion of it, and proposed to the plaintiff that he would take the wood at 246 cords, as he made it, or at 204 cords, as computed by the plaintiff. The plaintiff replied that he might have it at 204 cords, and the defendant agreed to take it. After the defendant left, the plaintiff discovered the mistake, and immediately notified the defendant that he could not have the wood at 204 cords. The defendant sent back word that he would again meet the plaintiff, and did so in the afternoon of the same day. Plaintiff declined to let defendant have the wood at 204 cords, but consented to throw off 5 inches in length from two piles. Defendant refused to take the wood, except at 204 cords. The auditor has stated many other incidents; but this is a substantial statement of the facts, as detailed

by the auditor. It is not claimed that the two piles of wood across the lake were delivered to the defendant, either actually *128 or constructively; so the controversy is confined to the wood situate on the plaintiff's farm in Benson.

I. The defendant agreed to purchase all the wood piled on the plaintiff's farm on the margin of the lake, at \$3.50 per cord; and if this comprised the whole case, it would be, in the language of Lord Brougham in the case of *Logan v. Le Mesurier*, 6 Moore P. C., 116 "Selling an ascertained chattel for an ascertainable sum"; and by the rule of law applied to the sale of ponderous and bulky articles, such as wood, logs, coal and the like, would effectually pass the property to the vendee. *Hutchins v. Gilchrist*, 23 Vt. 88; *Sanborn v. Kittredge*, 20 Ib. 639; *Birge et al. v. Edgerton*, 28 Vt. 291. But this case has other elements which impress upon it quite a different character. It was part of the contract that the parties should measure the wood and ascertain the quantity. They met for that purpose, and disagreed; and that disagreement was as to the substance of the contract. The plaintiff insisted that it was agreed and part of the contract, that defendant should take the wood at "running measure"; the defendant claimed that he purchased solid cords; and that issue grew into controversy, but was never settled. The report does not state when the price was to be paid; but in the absence of any special agreement, it is to be assumed that it was to be paid on delivery.

The principle is well settled, and uniform in all the cases, that when any thing remains to be done by either, or both, parties, precedent to the delivery, the title does not pass. And so inflexible is the rule that, when the property has been delivered, if any thing remains to be done by the terms of the contract, before the sale is complete, the property still remains in the vendor. *Parker v. Mitchell*, 5 N. H. 165; *Ward v. Shaw*, 7 Wend. 494. The contract must be executed, to effect a completed sale, "and nothing further to be done to ascertain the quantity, quality, or value, of the property." *BENNETT, J.*, in *Hutchins v. Gilchrist*, supra. "The general rule in relation to the sale of personal property, is, that if any thing remains to be done by the seller before delivery, no property passes to the vendee, even as between the parties." *POLAND, J.*, in *Hale v. Huntley et al.* 21 Vt. 147; *Chit. Con. 396.* *129 This rule of law applied to the facts as reported in this case, retains the property in the wood in the plaintiff, and leaves the contract executory, and, as a sale, incomplete. The case of *Simmons v. Swift*, 5 B. & C. 857, is much like this, but much stronger in its facts. It was an action for the price of a stack of bark sold at £9 5s. per ton. After the sale, it was agreed between the parties that the bark should be weighed by two persons, each party to name one. Part of the bark was weighed and delivered, the residue was much injured by a flood, before it was delivered, and for that reason, the buyer refused to take it. The court held that the bark was to be weighed before delivery, to ascertain the price; and as that act had not been done, the property remained in the seller, and that he must bear the loss. This was not a case where a portion was sold to be measured or weighed from the bulk, which would have no identity until severed and set apart; but the whole stack was sold, and a portion weighed and delivered. The subject of the sale was "ascertained" and the price "ascertainable;" yet the weighing was a thing to be done before the property passed to the purchaser.

In case of the insolvency of the defendant, it could hardly be claimed that the wood became part of his assets. Or if attached by his creditor, such creditor could hardly show a color of right, as against the plaintiff.

The plaintiff's counsel seem much to rely on the case of *Gilmour v. Supple*, 11 Moore P. C., 551, reported in 7 Am. Law Reg. (old series), 245. In that case, the plaintiff sold a raft of lumber for a fixed price per foot, with specification of the measurement of each log, made by a public officer appointed for that purpose under the law of Canada, amounting in the aggregate to 71,443 feet, "to be delivered at Indian Cove booms." The seller conveyed the raft to the place of delivery, made it fast to the booms, and notified the servant of the purchaser of the delivery, who took possession of the same. The judge charged the jury, that "if there was an actual delivery at the place, into the possession of defendant's servants, the plaintiff was entitled to recover." The jury found for the plaintiff. Mr. Justice CRESSWELL, in delivering the judgment, reviews, approvingly, the

*130 English cases of *Hanson v. Meyer*, 6 East, 614, *Rugg v. Minett*, 11 Ib. 210, and *Wallace v. Breeds*, 13 Ib. 522, and *Simmons v. Swift*, ut supra, and says: "If it appears that the seller is to do something to the goods sold on his own behalf, or if an act remains to be done by, or on behalf of, both parties, before the goods are delivered, the property is not changed." The learned judge then proceeds to show that the rule of law, well established by these cases, had no application to that case, and in conclusion says: "There was, therefore, nothing to be done by the seller on his own behalf; he had ascertained the whole price of the raft by the measurement previously made; he had conveyed the raft to Indian Cove, and, according to the finding of the jury, had delivered it there. Nor was there anything further to be done, in which both were to concur, as in *Simmons v. Swift*." The plaintiff recovered because the sale was completed by delivery, and nothing further remained to be done.

II. We think this case within the statute of frauds. Our statute is a substantial re-enactment of the 29 Charles II., and has received the

same construction given to the English statute. *Spencer v. Hale*, 30 Vt. 314, was a book action for the price of a quantity of fence posts, inspected and purchased by defendant, to be delivered on the cars at Shaftsbury. The plaintiff delivered the posts on the cars furnished by defendant, at Shaftsbury, and they were conveyed to the defendant's residence in New York. The defendant claimed that he never "accepted" them. The case turned upon the effect of the statute of frauds. Chief Justice REDFIELD delivered the opinion of the court, holding that the reception of the posts on board the cars furnished by the purchaser, and the forwarding of them by the station man, who, for that purpose, was his agent, was an acceptance; and in defining the rule for compliance with the statute of frauds, says: "It is undoubtedly true that the defendant, at the time and place, had a right to repudiate the posts after delivery. In other words, in order to perfect the case under the statute of frauds, something more is necessary than a mere delivery of the goods. In the language of the statute, the purchaser must 'accept and receive part of the goods.'" Authorities might readily be multiplied, affirming the *rule in substantially the *131 same language; but we recur to it as of acknowledged authority in our own courts. If we could hold in this case—considering the nature of the property sold—that there was a constructive delivery; yet, under the statute of frauds, "the purchaser had the right, at the time and place, to repudiate the wood after delivery." And the auditor finds, distinctly, that the defendant, while the measurement was being done (an act provided for by the contract of sale), refused to take the wood upon the terms and conditions prescribed by the plaintiff; and the plaintiff, as distinctly, refused to let him have the wood upon the terms exacted by the defendant. It is not important which party was in the wrong. It is enough that the purchaser refused to "accept" the wood, to render the sale invalid under the statute of frauds.

The judgment, therefore, of the county court is reversed and judgment on the report for the defendant to recover his costs.

PIERCE et al. v. COOLEY et al.

(23 N. W. 310, 56 Mich. 552.)

Supreme Court of Michigan. April 29, 1885.

Error to circuit court, Ingham county.

Clarence Cole, for plaintiffs. Cahill, Osterlander & Baird, for defendants.

CAMPBELL, J. This suit was brought to recover the price of a spoke-dressing machine, which plaintiffs claim was purchased by defendants, but which they claim they held merely on trial, when it was accidentally destroyed by fire. The machine had been in their wagon-shop in Lansing, and partially tried, prior to December, 1883, but had not worked well. Plaintiff wished them to give it a further trial with a different method of gearing, which would make it work better. A written instrument was signed by both parties, whereby defendants agreed to take it if it worked to their satisfaction, and to pay for it by note due May 1, 1884, or by cash payment on that day; and the plaintiff agreed to come over when notified that the machinery was ready for running. When the contract was made the work of the shop was suspended for a change of engine and machinery. The engine was soon set running again, but no rearrange-

ment of the gearing for the spoke-machine was made until just before the fire, which was April 22, 1884. This delay was for convenience of the general business.

The court below held that defendants were bound to try the machine within a reasonable time, and that they were liable to have it treated as accepted if they did not do so, and it was left to the jury to say whether they had done so. We think this was error. The contract was not to accept the machine if it worked well, but to accept it if it worked to defendants' satisfaction. They could reject it at any time if it did not please them, whether good or bad. *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906. This option, we think, continued until May 1, 1884, when they undoubtedly were bound to decide. The declaration in the special count was framed on this theory, and we think it plainly the correct one. The title could not pass without acceptance until the time of choice was over, and the plaintiff was owner of the machine when burned, and not the defendants.

The judgment must be reversed and a new trial granted.

SHERWOOD and CHAMPLIN, JJ., concurred. COOLEY, C. J., did not sit.

WOOD REAPING & MOWING MACH. CO.
v. SMITH.

(15 N. W. 906, 50 Mich. 565.)

Supreme Court of Michigan. June 6, 1883.

Error to circuit court, Jackson county.

G. T. Gridley and Thos. A. Wilson, for appellant. Hammond, Barkworth & Smith, for appellee.

GRAVES, C. J. This action was brought originally before a justice of the peace. The pleadings were put in orally. The declaration was stated as being "on all the common counts in assumpsit, and on a written contract by which defendant agreed to buy and receive from plaintiff a certain agricultural machine for the sum of three hundred dollars; claim, \$300 or under damages." The defendant stated that he "pleaded the general issue, and gave notice of proof that the machine did not answer the requirements of the contract."

The mention of a written contract referred to three simultaneous writings: First, a paper in the form of an order by the defendant on the plaintiff, and which was obtained from the defendant by Mr. Price, the plaintiff's soliciting agent, after considerable effort; second, a paper called a warranty, delivered by the agent at the same time to the defendant; and, third, a special written stipulation exacted by the defendant, and given on the same occasion. These papers, except the last, were printed blanks. There was originally between the word "allowed" and the word "days," in the second paper, the figure one; but at the time the papers were exchanged and the terms arranged this was stricken out, and it subsequently became a question whether anything was inserted in its place. This subject will be again noticed further on. The several writings appear below.¹

¹ (1) Order for Walter A. Wood's Self-binding Harvester. Walter A. Wood Mowing & Reaping Machine Company, No. 80 Taylor street, Chicago, Illinois. I hereby order one of Walter A. Wood's Twine (specify whether for twine or wire) Self-binding Harvesters, five feet six inches cut, to be delivered at my farm on or before July 1, 1880, care of J. D. Price, for which I agree to pay you or your agent the sum of \$300, in manner as follows: and to execute notes for \$100, payable on the first day of October, 1880; \$100, payable on the first day of October 1881; \$100, payable on the first day of October, 1882, with interest at the rate of 7 per cent. per annum from July 15, 1880; provided the machine fulfills your printed warranty, a copy of which I have this day received.

Robert E. Smith, Purchaser.

Taken by J. D. Price, Agent.

Post-office, Brooklyn.

Dated June 7, 1880.

A discount of 5 per cent. is to be allowed on all cash paid before October 1, 1880, and no interest charged on such payments.

(2) [Remove this warranty and give it to the purchaser.]

WARRANTY.

The Walter A. Wood Self-binding Harvester, five feet six inches cut, for which R. E. Smith,

The justice rendered judgment for the plaintiff for damages, \$101.36, besides costs, and the defendant appealed. In the circuit court the cause was tried before a jury on the same pleadings and a verdict entered for the plaintiff in the sum of \$300. This was on the twenty-first of June, 1881. The defendant objects to several rulings of the circuit judge. It appears from the case that about the first of July, 1880, the plaintiff, by its agents, produced a machine at the defendant's farm, and that Lavery and Jenkins then set it up. The time for cutting had not yet arrived. It appears also that these men were skilled machinists and experts in putting together, fixing, and running these implements, and were in the plaintiff's general employment to start new-sold machines, make them work as required by the terms of sale, instruct buyers how to use them, and generally to look after the operation of the machines during any permitted time of trial. Price, the soliciting or selling agent, kept his agency at Jackson, and the place of the defendant was in the township of Columbia, in Jackson county, and his post-office was at Brooklyn, in the same township. These places were several miles distant from Jackson.

In the afternoon of the fifth of July, being Monday, Lavery took the machine to the field and went round three times with it, and continued on the forenoon of the next day, the 6th, until about 11 o'clock, and then went away. On the succeeding afternoon, namely, the 7th, Jenkins came and took Lavery's place, and according to defendant's testimony, which is not opposed, continued "off and on three or four days" in handling and fixing the machine and trying to make it work properly. And, according to Price's testimony, Jenkins reported to him that he found the machine out of order and not doing good work, and that he put it in order, but thought it could not stay so because it was in the hands of unskillful people.

of Columbia, has this seventh day of June, 1880, given his order, is subject to the following warranty: This machine is warranted to be well made, of good materials, and with proper management capable of cutting and binding in a workmanlike manner, doing the binding at least as well as is usually done by hand. The purchaser shall be allowed — days' use to give the machine a fair trial, and if it should not work well immediate notice must be given to the agent from whom it was purchased, and reasonable time allowed to get to it and remedy the defects, if any, (the purchaser rendering necessary and friendly assistance,) when, if it cannot be made to do good work, it shall be returned to the place where received free of charge, and the payments of money or notes will be refunded. Failure to give notice as above shall be deemed conclusive evidence that the machine fills the warranty, whether it is kept in use or not.

Walter A. Wood Mowing & Reaping Machine Co.

(3) It is expressly agreed and understood that this contract is of no effect unless the machine works to my satisfaction.

The defendant gave evidence that Jenkins acknowledged his inability to make the machine operate as it ought to. He further gave evidence that he sent word by Jenkins to Price of the misconduct of the machine, and that he asked Jenkins where Price was, and was answered that Price would be there the next day; that Price did not come, however, and on Saturday, the 17th, he, the defendant, wrote him that the twine-binder made poor work, and that he could not keep it. This note was postmarked at the Brooklyn office on Monday, the 19th, and on the next day, but before the letter was received, Price went to defendant's and a controversy immediately occurred between them.

The defendant stated that it was the bargain that the machine was to be satisfactory to him, and that he was to have the whole of harvest time to test it. He produced the warranty on Price's request, and the latter then claimed that it fixed the time of trial at two days; that the figure "2" was inserted over the erased figure "1" in the printed blank; and that the defendant, having held on and beyond the time given, he was bound to keep the machine and pay for it according to the written terms. The defendant disputed this position, and insisted that he was not to be liable unless the machine was satisfactory to him, and that it was orally understood that he should have the whole period of harvest to satisfy himself, and, moreover, that the figure "2" was not inserted as stated by Price. The notes mentioned in the order were tendered by Price for execution, but Smith refused to sign them, and refused to have the machine. It is admitted by Price that his motive in putting in the figure "2" over the erased figure "1" was not entirely ingenuous. He says he became afraid that his express stipulation that the contract should be of no effect unless the machine worked to Smith's satisfaction, and without which stipulation it was impossible to get the order, would wholly displace and supersede the printed conditional warranty unless he wrote something in it at the very time which would change the presumption; and so he made the figure "2" over the figure "1," and then read the whole to the defendant. He also denied having received any notice of defendant's dissatisfaction prior to his call on the twenty-eighth of July. There was evidence, as we have seen, tending to show that the machine performed badly, and other evidence that it worked reasonably well, and that the defendant acknowledged to third persons that he was satisfied with it, or to that effect.

The questions chiefly material are—First, the character of the defendant's right under the special stipulation as to rejecting the machine; and, second, the meaning of the provision requiring immediate notice after the term of trial. The circuit judge was not able to say, on inspection, whether the place

mentioned in the printed warranty actually contained the figure "2" as claimed by Price or not, and he therefore left it as a question of fact to the jury. He ruled, however, that in case they found that the figure was not there, the provision would then necessarily imply that the period should be a reasonable time, and he added such hypothetical instructions as he was of opinion the circumstances called for. In regard to the defendant's right to reject the machine, he charged substantially that unless there were real faults in its operation for which the defendant might fairly entertain dissatisfaction with it, he was not at liberty to regard himself as not satisfied, and refuse to accept; and on the other hand, even in case real grounds existed for dissatisfaction, but he kept the machine beyond the time within which he was to give notice that it did not work satisfactorily to him, he was still bound.

The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other, must depend on the special circumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course, and all right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee, and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others.

But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention, or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. The following cases sufficiently illustrate the instances of the first class. *Gibson v. Cranage*, 39 Mich. 49; *Taylor v. Brewer*, 1 Maule & S. 290; *McCarren v. McNulty*, 7 Gray, 139;

Brown v. Foster, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Rossiter v. Cooper*, 23 Vt. 522; *Hart v. Hart*, 22 Barb. 606; *Tyler v. Ames*, 6 Laus. 280.

In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness and the adequacy of the grounds of it, are open considerations, and subject to the judgment of judicial triers. Among the cases applicable to this class are *Daggett v. Johnson*, 49 Vt. 345, and *Manufacturing Co. v. Brush*, 43 Vt. 528.

To which of these classes does this case belong? The answer is not difficult. The facts are very distinct. The plaintiff's own evidence is cogent that the defendant was extremely shy, and would enter into no arrangement except upon the terms of doing as he liked about keeping the machine after testing it. His mind was fixed immovably that no chance should be left to force the article upon him unless he finally chose to take it, and the special stipulation was specifically drawn and executed to meet this purpose and thereby induce the defendant to concur in an arrangement. Had it been the intention that he should be liable in case the performance of the machine were such, in the opinion of a jury, as to deserve his approval, it would have been quite unnecessary to get up the special writing. The original printed warranty would have answered the purpose. The transaction was one belonging to the first class, and the circuit judge was mistaken in deeming it otherwise.

The question concerning notice is now in order. The circuit judge very properly informed the jury that the defendant was not at all answerable for the space of time during which the plaintiff's agents occupied themselves in trying to make the machine work well, and that the time chargeable to him only began when they quit, and from thence ran on, whether he was in fact entitled to a reasonable time thereafter, or to only two days. But he further stated that the defendant was bound to see that Price had actual notice, if such was the case, that the machine did not work to his satisfaction; and, further, that he was bound to see that Price had this notice within two days after the agents quit, in case the figure "2" was in the printed warranty, or, if it was not in, then within a reasonable time after that event. This instruction was not proper on any theory. It held that, in case the figure "2" was in the warranty, the defendant was

bound, not only to complete his own trial of the machine during the first interval of two days, but also to see to it that Price, within the same period, had actual notice that it did not work well, if such was the result of the test. Now, it is very obvious that more than the whole two days may have been necessary to reach Price and notify him. But this is not all. The printed warranty, whatever its influence, if any, here, appropriated the whole of this period to the business of a test by the defendant, and postponed the necessity of starting to give notice till the expiration of it.

It may be expedient to add a word in this branch of the controversy. According to the terms, as we have seen, of the printed warranty, the purchaser, in case of the failure of the machine to work well during the space allowed for trying it, must give immediate notice to the selling agent. This provision for immediate notice does not mean the shortest time possible in which notice could be given. The terms must receive a sensible interpretation—an interpretation favorable to the general object and consistent with the surrounding conditions. It would be necessary to make allowance for the engagements of the parties, the distance between them, the facility of communication, and any other incidents having a bearing. No greater dispatch would be implied than such as would be fairly just and reasonable in view of all the circumstances. *Attwood v. Emery*, 1 C. B. (N. S.) 110; *Stamton v. Wood*, 16 Q. B. 638; *Roberts v. Brett*, 11 H. L. Cas. 337; *Toms v. Wilson*, 4 Best & S. 442-445; *Massey v. Sladen*, L. R. 4 Exch. 13; *Tennant v. Bell*, 9 Q. B. 684; *Spenceley v. Robinson*, 3 Barn. & C. 658; *Thompson v. Gibson*, 8 Mees. & W. 281; *Waddell v. Reddick*, 2 Fred. 424.

Complaint is made that the recovery was excessive, even if the plaintiff were entitled to prevail, and the point is that by the terms of the transaction three notes were to be given, and that the time of one only had expired when the suit was commenced. It is hardly worth while to go into that question now. From the pleadings and facts in the record, it is not easy to discover the theory on which the case proceeded; but hereafter the real ground of action may be distinctly indicated. The measure of damages, as well as the course of proof, would be affected by the form of claim asserted on the transaction. *Benj. Sales* (1st Am. Ed.) § 765, and notes.

The other points are of no importance. The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

PLATT v. BRODERICK.

68 N. W. 579, 70 Mich. 577.

Supreme Court of Michigan. June 8, 1888.

Error to circuit court, Berrien county; Andrew J. Smith, Judge.

Assumpsit by George W. Platt, assignee of the Walter A. Wood Mowing & Reaping Machine Company, against Edward Broderick, for the price and value of a mowing-machine. This action was brought in a justice's court, where the defendant had judgment for costs. The plaintiff appealed to the circuit court, where he recovered judgment for \$65 before a jury. Defendant assigns error.

MORSE, J. The plaintiff declared against the defendant in justice's court for the price and value of a mowing-machine, \$65, sold by him, as agent of the Walter A. Wood Mowing & Reaping Machine Company, to said defendant, which said claim or account of \$65 was assigned by said machine company to him before the commencement of this suit. The defendant had judgment in the justice's court for costs. The plaintiff appealed to the circuit court for the county of Berrien, in which court, before a jury, the plaintiff recovered judgment for \$65. The plaintiff claimed, upon the trial, that the machine was sold to the defendant in the summer of 1886. The terms of sale were agreed upon on a certain Saturday in the month of July. Broderick was to take the machine home that day. An agent of the machine company, one Knearl, was to go out to Broderick's place on the following Monday, and set the machine up, and stay until it worked satisfactorily. If it did not suit the defendant, he was to bring it back Monday, and receive pay for bringing it in. If it worked all right to his satisfaction, Broderick was to keep the machine, and pay \$65 for it,—one-half October, 1886, and the balance October, 1887, with interest from October, 1886. Under this arrangement, defendant took the machine home with him Monday morning. Knearl testifies he went out to Broderick's farm to fulfill his part of the agreement. He found that defendant had set up the machine, and was at work with it. He made some changes in the setting of the machine. It was tried in all kinds of grass growing on defendant's place, and worked well. Knearl stayed about three hours, when Broderick told him he "liked the machine first rate," and he need not stay any longer. He then went back to town. A few days after, the defendant brought the machine back. The plaintiff refused to receive it, and defendant unloaded it in the yard of Mrs. Downey, about 20 feet from plaintiff's premises. The defendant's version of the transaction was that the price of the machine was agreed upon at \$60, with a year's time, without interest. If the machine suited him, he was to take it out to his farm, and try it until he was satisfied. There was no time mentioned when he should bring it back if he did not like it; nor was there any limit as to

time of trial. Did not tell Knearl that he was satisfied with the machine, or anything of the kind. The machine did not do good work. Did not suit him, and he returned it on Thursday. Did not use it except on Monday, when he mowed about three acres. The testimony shows that some time in October, 1886, the plaintiff demanded of the defendant a settlement for the machine and notes, in accordance with the terms of the agreement; it being his custom to take notes when time was given. Demanded notes several times afterwards, but defendant always refused to give them, or pay for the machine. The circuit judge instructed the jury that in setting up the machine on Monday, before Mr. Knearl arrived at his place, the defendant violated the contract of sale, and was bound to take the machine, and must pay for it; and that the only question to be determined by the jury was the price of the machine,—whether it was \$65, as claimed by the plaintiff, or \$60, as contended by the defendant.

This instruction was erroneous. It does not appear that the setting up of the machine by the defendant had anything to do with the working of the same, or that any complaint was made by the plaintiff or Knearl because of such setting up of the machinery by defendant. The issue was a simple one. If the plaintiff's theory of the contract was correct, and defendant, after using the machine on Monday, told the agent he was satisfied with it, and did not return it on that day, the plaintiff was entitled to recover the price of the machine. If the defendant's version of the contract was the true one, the plaintiff could not recover, and the verdict should have been for the defendant. Under the agreement, as testified to by both parties, it was immaterial whether the machine worked well or not. The defendant was to be satisfied with it; and, if it did not suit him, he had a right to return it, on Monday if plaintiff's theory was accepted, and upon the day it was returned if the agreement was as claimed by Broderick. *Machine Co. v. Cochran*, 31 N. W. 561; *Manufacturing Co. v. Ellis*, 35 N. W. 842; *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906.

One other objection need only be mentioned. It was not competent for either the defendant or Lawrence to testify that Knearl stated to Lawrence what the bargain was between him and defendant. If Lawrence was present when the bargain was made, he could testify to what was said between the parties, in rebuttal of Knearl's testimony. But a statement made by Knearl after the contract was completed, not in the presence of plaintiff, could not be received in evidence except in impeachment of Knearl's testimony; and, in such case, Knearl's attention must be called to such statement, which was not done, as appears by the record. The judgment will be reversed, and a new trial granted.

SHERWOOD, C. J., and CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

UNITED STATES ELECTRIC FIRE-
ALARM CO. v. CITY OF BIG
RAPIDS.

(43 N. W. 1030, 78 Mich. 67.)

Supreme Court of Michigan. Nov. 15, 1889.

Appeal from circuit court, Mecosta county.

Action of *assumpsit* brought by the United States Electric Fire-Alarm Company of Evart, Mich., against the city of Big Rapids, to recover the price of an electric fire-alarm, put up by the plaintiff for the defendant under contract. Judgment for defendant, and plaintiff appeals.

M. Brown and *Austin Herrick*, for appellant. *Frank Dumou*, for appellee.

CHAMPLIN, J. This cause was tried before the court without a jury, who, on request of the parties, made a finding of facts and law, from which it appears that the city of Big Rapids has a volunteer fire department, consisting of six fire companies, five hose companies, and one hook and ladder company, and the firemen who compose the various companies reside within a radius of three-fourths of a mile from the court-house in said city. On the 6th day of June, 1887, the common council of the city of Big Rapids appointed a committee of five members of the council to consider the various propositions for a fire-alarm submitted to it, and those which should be submitted to them thereafter. On the 24th day of June, 1887, the United States Electric Fire-Alarm Company of Evart, Mich., submitted to said committee the following proposition in writing: "Office of United States Electric Fire-Alarm Co. of Evart, Michigan, June 24th, 1887. Alderman Comstock, Chairman Fire-Alarm Committee, Big Rapids, Mich.—Dear Sir: In case it is decided to use the court-house tower instead of building a bell tower, we will furnish the following proposition to erect a large fire-alarm bell, tower bell striker, alarm circuit, etc., as follows: One 3,000-pound bell and hangers, one medium sized tower bell striker for electrically striking the alarm and location of fires on the bell, and to be operated and controlled from the water-works pump house; the bell and striker to be placed in the court-house tower, and one manual repeater located at the water-works pump house for automatically operating the tower bell striker, and capable of repeating the number of any one of thirty different fire-alarm boxes, as may be desired, together with all the poles, wires, insulators, brackets, battery, etc., necessary for constructing line and electrical alarm circuit, connecting repeater at water-works with tower bell striker in the tower; said poles to be good sound cedar, of sufficient length to carry the line over all other electrical wires now erected; the line to be of the very best quality of No. 12 galvanized telegraph wire, well insulated on good glass insulators, secured to the poles, and all joints well soldered; also all the

necessary battery and minor attachments for the successful operation of the same,—all complete and ready for service for the sum of \$1,248. It being indefinite as to the actual weight of a bell, although intended to be cast of a given weight, it is proposed to make an addition or reduction in the price given at the rate of 16½ cents per pound, according to the variation of the weight of the bell from the proposed weight. The company agrees to do all of the above work, and complete the contract in about thirty days from the date of signing the contract, and your honorable body shall thoroughly test the working of the same within thirty days after the completion of said work, and if found to be satisfactory, and according to contract, accept and pay for same. In case the manual repeater is left from the list of apparatus and a signal key used, the above figures will be reduced to \$1,148. It is further proposed that in case a 2,500-pound bell is used the above figures will be reduced to \$1,063. The bell foundry guaranty all bells, and we guaranty all of our machinery as to perfection of operation, and against breakage caused by flaws or defects in castings. All of which is respectfully submitted. UNITED STATES ELECTRIC FIRE-ALARM CO., S. A. CHASE, sec'y." Alderman Comstock, one of the committee, afterwards reported to a meeting of the common council on July 5, 1887, that the committee had negotiated for a fire-alarm with a 3,000-pound bell, and asked the council to settle on some location for it to be placed. Such report was received and the committee discharged, and the following record thereof was entered upon the journal of the common council, to-wit: "Alderman Comstock, chairman of the special committee, appointed to purchase a fire-alarm, reported that they had negotiated for an alarm with a 3,000-pound bell, and asked the council to settle upon a location for it to be placed. Report accepted, and committee discharged."

On the 23d of July, 1887, the city of Big Rapids entered into a contract in writing with the plaintiff in this suit, which said contract was signed by the mayor in behalf of the city, and by the United States Electric Fire-Alarm Company, by S. A. Chase, its secretary. The aforesaid proposition made by the United States Electric Fire-Alarm Company was attached to said written contract, and became and was a part thereof, and in addition thereto the contract contained the following, that is to say: "It is hereby agreed between the city of Big Rapids of the one part, and the United States Electric Fire-Alarm Company of the other part, as follows: The said second party hereby agrees to put in a fire-alarm bell in court-house tower, to do all work and furnish all material and things used in connection therewith, as specified in specifications hereto attached, consisting of four sheets; and same are declared to be and are a part of this contract. Said second party agrees to set poles at such distance apart as to support

wire in a good and substantial manner, and to set same of sufficient depth to stand in proper manner; poles to be set in streets and alleys to points hereinafter named at intersection of Grand Traverse and Warren avenue, unless permission is granted to set them on private property, or to cross same with wire. One pole to be set at intersection of Grand Traverse street with Warren avenue; thence along Warren avenue to Hemlock street; thence along Hemlock street to River street; thence along River street to Maple street; thence across Maple street to alley between Stewart and Ives avenue; thence southerly along to Elm street; thence to court-house tower. All work to be done in a good and workman-like manner, and work done and contract to be performed within forty days from the date hereof. The tone of bell to be second A below middle C on the organ. Said first party to have thirty days after contract is completed to test bell and working apparatus, and, in case same is satisfactory as per contract, then they agree to pay said second party the sum of twelve hundred and forty-eight dollars therefor, or as per specifications as to weight, &c. Said first party agrees to furnish and put in ceiling and floor in tower." In pursuance of said contract plaintiff put in for the defendant a fire-alarm, including a bell weighing 3,205 pounds, and the total amount of the plaintiff's demand against the city for the fire-alarm system, including the bell, is \$1,294.99. The bell was put in the court-house tower, and the tone of the bell is about E flat. On September 24, 1887, plaintiff notified the common council that the system put in by it was complete, and requested the council to fix a time when they would test the same, and the council fixed the 1st day of October, 1887, at 9:30 o'clock A. M., as the time when such test would be made. The common council assembled accordingly for the purpose of testing the fire-alarm, and the plaintiff, by its secretary, S. A. Chase, made a thorough test of the working of said fire-alarm system, and the tone and volume of sound of said fire-alarm bell then in the court-house tower. The members of the council also tested the tone and volume of the bell from the different fire-alarm boxes. Another test of the fire-alarm was afterwards made in the night-time, by turning in an alarm from one of the boxes, said council being then in session in their council chamber, and listening thereto. A still further test was made on the 9th of October, 1887, it being on the occasion of a fire in the city. On the 10th of October, 1887, the council considered the question whether the said fire-alarm system and said fire-alarm bell were satisfactory to said common council, and whether said common council should accept and pay for the same, and took action thereon, and then and there considered that said fire-alarm system and bell were not satisfactory to said common council, and they refused to accept the same, or any part there-

of, for and in behalf of the city, and they then and there caused a record of their determination to not accept the same, and directed the recorder of the city to notify the plaintiff of such action. The recorder sent to the plaintiff by mail the notice following: "Big Rapids, October 13, 1887. Electric Fire-Alarm Co., Evart, Mich.—Gentlemen: At a meeting of the common council last Monday night they rejected the fire-alarm bell as not satisfactory. Yours, etc., S. A. STAMBAUGH, Recorder." The notice was received by the secretary of the company on the 15th of October, 1887, at Evart, Mich. During the same month the common council adopted the following resolution: "Whereas, the city of Big Rapids has made a contract with the Electric Fire-Alarm Company of Evart, Michigan, the condition of such contract being that said fire-alarm company furnish a bell weighing 3,000 pounds, and all apparatus for striking the same, material and work to be satisfactory to the city; therefore, resolved by the common council of the city of Big Rapids that the tests of the same have not been satisfactory; and it is further resolved that we do not accept the same, as it is not satisfactory according to contract." The common council of the city has never in fact accepted said fire-alarm system, and said fire-alarm bell which is a part thereof, and the city has not used the same for any purpose whatever.

The fire-alarm bell is not suitable for the purpose of a fire-alarm for the reason that its tone and volume of sound is such that said bell cannot be heard easily by the firemen when within their houses or places of business, or when engaged in anything demanding their attention in any part of the city. The court further found that the bell put up by the plaintiff was the exact kind of a bell contracted for by the defendant, except as to the tone thereof; that the fire-alarm system furnished by the plaintiff for the defendant, and all work done by it in putting up said fire-alarm system, and the materials furnished therefor, were furnished and done in accordance with the terms of said agreement, except the tone of the bell, which was about E flat, instead of second A below the middle C on the organ; that defendant never objected to the bell on account of the difference in tone; that the bell was properly manufactured, was of the best bell metal, had been properly tested by competent experts before it was put up by the plaintiff, and was in every respect a first-class bell; that bells of the weight of the one in question are not manufactured of the tone mentioned in said agreement, but neither one of the parties knew this fact at the time said agreement was made. As soon as the plaintiff found it out it notified said C. W. Comstock, who was the chairman of the committee on water-works of the common council, which said committee had in charge the matter of said fire-alarm system, and who, upon receiving said notice, notified the plaintiff to

do the best it could in regard to the tone of the bell, which it did. The circuit judge also found that the common council, acting in good faith, made a thorough and fair test of the working of said fire-alarm, and that they refused to accept the same in behalf of the city in good faith, and for the reason that the same was not suited to the needs of the city, and was of no practical utility as a fire-alarm. He also found that the agreement above set out was the only agreement between the parties in respect to the premises. As a conclusion of law he found that the plaintiff had not made out by its proofs such a case as would entitle it to a judgment in any amount whatever against the defendant.

The plaintiff failed to show a substantial compliance with that portion of the contract which stipulated that the tone of the bell should be second A below middle C on the organ. We do not think that the defendant waived this provision of the agreement by the fact that bells of 3,000 pounds' weight are not manufactured having such tone, and that Mr. Comstock, when notified of that fact, told plaintiff to do the best it could with regard to the tone of the bell. The fact is not found that Mr. Comstock had any authority to make any changes in the contract, and the records of the proceedings show that when the committee reported the proposition made by plaintiff to the common council they were discharged.

Counsel for plaintiff makes no claim in this case under the common counts in *assumpsit*. He claims to recover upon the sole ground that the difference in the tone of the bell was waived, and in all other respects plaintiff has fully performed its contract, and the defendant has refused to accept and pay the contract price. While admitting that the rights of the parties depend upon the construction of the contract, he insists that the defendant did not have the arbitrary power to refuse to accept the work done, and materials furnished, notwithstanding the plaintiff had performed in every particular; that, if the plaintiff performed the agreement on its part, the defendant was bound to accept and pay. He admits that the defendant had the right to test the property for the purpose of ascertaining whether it was according to contract, and if it was they were bound to be satisfied, and were legally liable to pay the contract price. The particular clauses of the contract to be construed read as follows: "The company agrees to do all of the above work and complete the contract in about thirty days from the date of signing the contract, and your

honorable body shall thoroughly test the working of the same within thirty days after the completion of said work, and, if found to be satisfactory, and according to contract, accept and pay for the same." This language is contained in the written proposition made by the plaintiff to defendant. The written contract executed by the parties contained this clause, namely: "Said first party to have thirty days after contract is completed to test bell and working apparatus, and in case same is satisfactory, as per contract, then they agree to pay," etc. The proposition of the plaintiff was attached to and made a part of the contract between the parties, and consequently these clauses must be construed together. The language employed by the plaintiff in making the proposition clearly indicates that the council was not obliged to accept unless the work was done according to contract, and was also satisfactory, and this is a reasonable construction of the contract. The council were acting in a representative capacity, and in the interest of the public. This contract involved a change in their system, and was to them in the nature of an experiment. What they required was efficiency in the system which they were about to adopt, which, while it might operate well under a paid fire department, should be adapted to the workings of a volunteer fire department, the members of which are in general following their usual avocations, and volunteer their services upon an alarm of fire. It would appear that the alarm should be such that the members would hear it while about their business in their shops and counting rooms, as well as when in their houses at night. The council had a right, not only to test the workings of the system to ascertain whether it was according to contract, but to satisfy themselves if the system furnished an alarm sufficient for the purpose for which they designed to employ it. The clause last cited from the written contract does not change the import of the clause above quoted from the plaintiff's proposition. They must be construed together, and the reasonable construction of them is that the city of Big Rapids was not obliged to accept and pay for the fire-alarm furnished by the plaintiff, unless it was satisfactory to its common council when tested. *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. Rep. 906; *Machine Works v. Lowell*, 62 Mich. 546, 29 N. W. Rep. 105; *Manufacturing Co. v. Ellis*, 68 Mich. 101, 35 N. W. Rep. 841.

The judgment of the circuit court is affirmed. The other justices concurred.

COMMERCIAL NAT. BANK v. GILLETTE.

(90 Ind. 268.)

Supreme Court of Indiana. May Term, 1883.

J. M. Vanfleet, for appellant. J. H. Baker and J. A. S. Mitchell, for appellee.

ELLIOTT, J. The Elkhart Car Company, by a written contract, sold to the appellant 510 car wheels, constituting a part of 1,100 wheels; at the time of the sale the wheels were in one common mass, and there was no separation nor any designation of the wheels sold to the appellant; after the execution of the contract the entire lot of wheels was seized upon executions issued at the suit of appellee, and this action was brought for the possession of those sold.

The contention of appellee is that appellant acquired no title, because the articles sold were not designated or separated from the common lot of which they formed a part, and this contention prevailed in the court below.

There is much strife in the American cases upon this question, but none in the English. The weight of the former is, perhaps, with the theory of appellant, but the text-writers are, so far as we have examined, all with the English decisions. Our own cases are in harmony with the long established rule of the common law. In the case of Bricker v. Hughes, 4 Ind. 146, the English rule was approved and enforced. In Murphy v. State, 1 Ind. 366, the court said: "To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough * * * that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be completed, must be separated from the mass." This doctrine found approval in Scott v. King, 12 Ind. 203, and there are other cases recognizing it as the correct one, among them Moffat v. Green, 9 Ind. 198; Railway Co. v. Maguire, 62 Ind. 140; Bertelson v. Bower, 81 Ind. 512; Lester v. East, 49 Ind. 588, *vide* opinion, page 594. The rule which our court has adopted is upheld by the American cases of Hutchinson v. Hunter, 7 Pa. St. 140; Haldeman v. Duncan, 51 Pa. St. 66; Fuller v. Bean, 34 N. H. 290; Ockington v. Ritchey, 41 N. H. 275; Morrison v. Woodley, 84 Ill. 192; Woods v. McGee, 7 Ohio, 197; McLaughlin v. Piatti, 27 Cal. 463; Conright v. Leonard, 11 Iowa, 32; Ropes v. Lane, 9 Allen, 592; Ferguson v. Northern Bank, 14 Bush, 555. In Michigan, the rule seems not to be definitely settled, but in a

late case it was said: "To the elaborate argument made for the defence to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of Anderson v. Brenneman, 44 Mich. 198, 6 N. W. 222." Bank v. Hibbard, 48 Mich. 118, 11 N. W. 834.

The civil law rule is the same as that of the common law, and our great lawyers have given it unhesitating approval. 2 Kent, Comm. 639; Story, Sales, § 296.

The American cases which have departed from the long settled rule, are built on the cases of Kimberly v. Patchin, 19 N. Y. 330, and Pleasants v. Pendleton, 6 Rand. 473, and these cases proceed upon the theory that commercial interests demand a modification of the rule. In our judgment, commercial interests are best promoted by a rigid adherence to the rule which the sages of the law have so long and so strongly approved. The rule secures real transactions and actual sales, and thus checks the wild spirit of speculation. It prevents, in no small measure, the making of mere wagering contracts; it puts business on a stable basis, and makes it essential that there should be real, and not sham, transfers of property; it makes titles secure, protects creditors and purchasers and represses fraud. If it were granted that the rule does somewhat interfere with the freedom of business transfers, still the good it produces far outweighs this inconvenience. But we do not believe it does interfere with actual business transfers, for common experience informs us that real sales are seldom, if ever, made without a specific designation of the thing bought. The rule may interfere with dealers in "margins," makers of "corners," and framers of "options," and to affirm that it does do this is to give it no faint praise. In principle the rule is sound, and in practical operation salutary.

The efforts made by the courts that have departed from it to make exceptions, to manufacture distinctions and point out differences in order to escape disastrous consequences, afford strong evidence of the wisdom of the rule. The line of decisions in some of the states, where a departure has been taken, is a devious and tortuous one, and this is to be expected when once sound principle is turned from and new rules sought and adopted which have no support in fundamental principles.

We have no disposition to depart from the rule which has so long prevailed in this state and elsewhere.

Judgment affirmed.

Petition for rehearing overruled.

KIMBERLY et al. v. PATCHIN.

(19 N. Y. 330.)

Court of Appeals of New York. June Term.
1859.

Appeal from the supreme court. Action to recover the value of 6000 bushels of wheat, alleged to have been the property of the plaintiffs, and to have been converted by the defendant. Upon the trial before Mr. Justice Greene, at the Erie circuit, it was proved that one Dickinson had in warehouse, at Littlefort, in Wisconsin, two piles of wheat, amounting to 6249 bushels. John Shuttleworth proposed to purchase 6000 bushels of wheat. Upon being shown the piles, he expressed a doubt whether they contained that quantity. Dickinson declared his opinion that they did, and agreed to make up the quantity if they fell short. A sale was then made at seventy cents per bushel, Dickinson signing and delivering to Shuttleworth a memorandum, as follows:—

"Littlefort, February 17, 1848.

"John Shuttleworth bought of D. O. Dickinson.
6000 bushels of wheat, delivered on
board, 70 cents..... \$4,200
Received his draft upon John
Shuttleworth, of Buffalo, for.. \$2,100
To remit me..... 1,600
Five drafts of \$100 each..... 500

4,200

"D. O. Dickinson."

He also signed and delivered to Shuttleworth this paper, viz:—

"Littlefort, February 18, 1848. 6000 bushels wheat. Received in store 6000 bushels of wheat, subject to the order of John Shuttleworth, free of all charges, on board. D. O. Dickinson."

The wheat was left undisturbed in the warehouse. Shuttleworth sold the wheat to the defendant, assigning to him the bill of sale and warehouse receipt. Dickinson, shortly afterwards, sold the whole quantity of wheat in the two piles to a person under whom the plaintiffs derived title. The defendant having obtained the possession of the wheat, this action was brought. The judge, under exception by the defendant, directed a verdict for the plaintiffs, which was rendered, and the judgment thereon having been affirmed at general term, in the eighth district, the defendant appealed to this court.

John H. Reynolds, for appellant. John L. Talcott, for respondents.

COMSTOCK, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale made by Dickinson to one Shuttleworth on the 18th of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim, was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of 6000 bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the 6000 bushels subject to the vendee's order; of the price \$2600 was paid down, and the residue \$1600, which was to be paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related, was estimated by the parties at about 6000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was 6249, being an excess of 249 bushels. When Shuttleworth bought the 6000 bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title,

the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: In the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of 6000 bushels, and Dickinson of the residue, which turned out to be 249 bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of 6000 bushels, and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it, no one could own the wheat, and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly

according to their contracts. One would be entitled to 6000 bushels, and the other to what remained after that quantity was subtracted.

Again suppose, Dickinson having in store and owning 249 bushels, Shuttleworth had deposited with him 6000 bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the 6000 bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. Story, *Bailm.* § 40; 2 *Bl. Comm.* 405.

These and other illustrations which might be suggested, demonstrate the possibility of a divided ownership in the 6249 bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question, so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should thenceforth own 6000 bushels without a separation from the residue. And this, I think, is precisely what was done. The 6000 bushels might have been measured and delivered to the purchaser, and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment—resulting in the same mixture as before—most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so.

There are in the books a considerable number of cases having a real or some apparent bearing upon the question under consideration. Some of them very unequivocally support the defendant's title under the sale to Shuttleworth. A few only of these will be cited. In *Whitehouse v. Frost*, 12 East, 614, the vendors owned forty tons of oil secured in one cistern, and they sold ten tons out of the forty, but the quantity sold was not measured or delivered. The purchaser sold the same ten tons to another person, and gave a written order on the original vendors, which, on being presented, they accepted, by writing the word "Accepted"

on the face of the order, and signing their names. It was held by the English common pleas that the title passed; considerable stress being laid on the acceptance of the order, which, it was said, placed the vendors in the relation of bailees to the quantity sold. This was in 1810. In the following year the case of *Jackson v. Anderson*, 4 Taunt. 24, was decided in the King's bench. That was an action of trover for 1960 pieces of coin called Spanish dollars. Mr. Fielding, at Buenos Ayres, remitted to Laycock & Co., at London, \$4700, and advised the plaintiffs that 1960 of the number were designed for them in payment for goods bought of them. Laycock & Co. received the 4700 pieces, and pledged the whole of them to the defendant, who sold them to the Bank of England. It was held: 1. That the letter of advice was a sufficient appropriation of \$1960 to the plaintiffs. 2. That the plaintiffs and defendant did not become joint-tenants or tenants in common of the dollars. 3. That although no specific dollars were separated from the residue for the plaintiffs, yet as the defendant had converted the whole, trover would lie for the plaintiffs' share. Of course the action in its nature directly involved the plaintiffs' title, and it was held that the sale or appropriation of a part without any separation was a perfect sale. In *Pleasants v. Pendleton*, 6 Rand. 473, the sale (committing immaterial circumstances) was of 119 out of 123 barrels of flour, situated in a warehouse, all of the same brand and quality. It was held by the Virginia court of appeals, upon very elaborate consideration, and after a review of all the cases, that the title was transferred by the sale. See, also, *Damon v. Osborn*, 1 Pick. 477; *Crofoot v. Bennett*, 2 N. Y. 258. In the last mentioned, which was decided in this court, the sale was of 43,000 bricks in an unfinished kiln containing a larger quantity. A formal possession of the whole brick-yard was taken by the purchaser. It was held that he acquired title to the 43,000, although no separation was made. In the opinion of Judge Strong, the case was made to turn mainly on a supposed delivery of the whole quantity. But, with deference, that circumstance does not appear to me to have been the material one, inasmuch as all the bricks confessedly were not sold. The delivery, therefore, did not make the sale, and if part could not be sold without being separated, I do not see how a formal delivery of the whole brick-yard could cure the difficulty. The learned judge speaks of the transaction as a delivery of the whole quantity "with the privilege of selection." But assuming, as he did, that the want of selection or separation was the precise difficulty to be overcome, it is not easy to see how a privilege to select could change the title before the selection was actually made. The case, therefore, it seems to me, can only stand on the ground that the sale was, in its nature, complete; the formal delivery of the whole being doubtless a circumstance entitled to weight in arriving at the intention of the parties. The case is, in short, a strong

authority to prove that, in sales by weight, measure, or count, a separation of the part sold from the mass is not in all cases a fundamental requisite.

Referring now to cases where it has been held that sales of this general nature were incomplete, it will be found that they are not essentially and necessarily opposed to the conclusion that, in the instance before us, the title was changed. In *White v. Wilks*, 5 Taunt. 176, a merchant sold twenty tons of oil out of a stock consisting of different large quantities in different cisterns, and at various warehouses. The note of sale did not express the quality or kind of oil sold, or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay which was to satisfy the contract. Very clearly the title could not pass upon such a sale; and so it was held, although the seller was entitled by the contract to charge "1s. per ton per week rent," for keeping the oil. A very different question would have been presented if the cistern from which the twenty tons were to be taken had been specified. The mass and quality would then have been ascertained. As it was, the subject of the contract was not identified in any manner. The remarks of the judge, evidently not made with much deliberation, must be construed with reference to the particular facts of the case.

In *Austen v. Craven*, 4 Taunt. 644, there was a contract to sell 200 hogsheds of sugar, to be of four different kinds and qualities which were specified. It did not appear that the seller, at the time of the contract, had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. The sale was, moreover, at so much per cwt., requiring that the sugar should be weighed in order to ascertain the price. In these circumstances the case was considered plainly distinguishable from *Whitehouse v. Frost*, supra, and it was held that the title did not pass. I do not see the slightest ground for questioning the decision, although, perhaps, one or two remarks of Chief Justice Mansfield are capable of a wider application than the facts of the case would justify.

The two cases last mentioned have been not unfrequently cited in various later English and American authorities, which need not be particularly referred to. Some of these authorities may suggest a doubt whether the title passes on a mere sale note by measure or weight out of a larger quantity of the same kind and quality, there being no separation and no other circumstances clearly evincing an intention to vest the title in the purchaser. It is unnecessary now to solve that doubt, because none of the decisions announce the extreme doctrine, that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and denominated

larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale professing to transfer 6000 bushels of wheat, but, waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other.

One of the cases, however, not yet cited, deserves a brief consideration, because it was determined in this court, and has been much relied on by the plaintiffs' counsel. I refer to *Gardiner v. Snyder*, 7 N. Y. 357. The owner of flour delivered it in various parcels to a warehouseman, and from time to time took receipts from him. One of these receipts was held by the defendants and others by the plaintiffs, both parties having accepted and paid drafts on the faith thereof. The defendants' receipt was the first in point of time, and was for 536 barrels, being given at a time when in fact there were but 201 barrels in the warehouse, so that it covered 335 more than were then on hand. But other quantities were subsequently delivered at the warehouse, all of the same kind and quality, and the defendants, in fact, received by shipment to them, 500 barrels. For the conversion of this quantity they were sued by the plaintiffs, who had failed to receive the flour which their receipts called for. It cannot fail to be seen from this statement that the defendants, having the first receipt and receiving no more flour than it specified, were entitled to judgment by reason of the priority of their title; and this ground of decision is very clearly stated in the opinion of the chief judge. He thought if the transfer of the receipts could

pass the title to the flour, notwithstanding the mixture of all the quantities together, that the one held by the defendants entitled them not only to the 201 barrels in store when it was given, but also to so many barrels delivered in store afterwards as were necessary to make up their number. This view, which appears to me correct, was fatal to the plaintiffs' case. But in another aspect of the controversy, the learned chief judge was of opinion that the transfer to the plaintiffs of the receipts held by them passed no title, on the ground that the quantities which they respectively covered were all mixed together in the storehouse. Assuming the correctness of that view—which I am constrained to question—the case is still unlike the present one. The transfer of a warehouseman's receipt, given to the owner, was certainly no more than a simple sale note of the specified number of barrels; and where, in such cases, that is the whole transaction between vendor and vendee, I have already admitted a doubt, suggested by conflicting cases, whether the title passes. If the owner of the flour had held it in his own warehouse, and had not only given a bill of sale of a portion of it, but had himself executed to the purchaser another instrument declaring that he held the quantity sold as bailee and subject to order, then the case would have resembled the one now to be determined.

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the 6000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought, and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of 6000 and the plaintiffs of 249 parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

GRAY and GROVER, J.J., dissented; STRONG, J., expressed himself as inclined to concur, if necessary to a decision, but it being unnecessary, he reserved his judgment.

Judgment reversed and new trial ordered.

SANGER et al. v. WATERBURY et al.

(22 N. E. Rep. 404, 116 N. Y. 311.)

Court of Appeals of New York, Second Division. Oct. 22, 1889.

Appeal from judgment of the general term of the supreme court, in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of the defendants, entered upon a verdict directed by the court. This was an action of replevin brought to recover the possession of 238 bags of coffee identified and described in the complaint as follows: "89 bags, marked No. 6, H. L. B. & Co., D. B. & Co.; 32 bags, marked No. 8, H. L. B. & Co., D. B. & Co.; 14 bags, marked No. 10, H. L. B. & Co., D. B. & Co.; 29 bags, marked No. 12, H. L. B. & Co., D. B. & Co.; 68 bags, marked No. 14, H. L. B. & Co., D. B. & Co.; 6 bags, marked No. 16, H. L. B. & Co., D. B. & Co." The complaint alleged, and the answer admitted, "that on or about the 22d day of July, 1885, the said goods * * * were sold by the plaintiffs to the defendants John K. Huston and James E. Huston, * * * on the credit of sixty days for one-half thereof, and of ninety days for the balance thereof." It appeared that the plaintiffs, on the 6th day of July, 1885, purchased of Boulton, Bliss & Dallett 605 bags of coffee, then stored with E. B. Bartlett & Co. On the 22d day of July the plaintiffs sold the 238 bags of coffee hereinbefore referred to to J. K. Huston & Co., of Philadelphia. That firm, on the 24th day of July, upon the security of the coffee thus purchased, borrowed from the defendants Waterbury & Force \$2,300, and then transferred the coffee to them. On July 27th following, said firm failed, making a general assignment. On the next day, the plaintiffs commenced this action, by means of which the coffee was taken from the possession of Waterbury & Force. The coffee then was, as it had been from the time of the purchase by the plaintiffs, actually deposited in the warehouse of E. B. Bartlett & Co., and had not as yet been weighed.

William W. Goodrich, for appellants. *Edward N. Shepard*, for respondents.

PARKER, J., (*after stating the facts as above*.) The appellant contends that the title to the coffee in controversy did not pass to J. K. Huston & Co., and that therefore the transfer to Waterbury & Force did not vest in them the title or the possession. The sale is admitted; but as the coffee had to be weighed, in order to ascertain the amount to be paid to plaintiffs, it is insisted that the title remained in the plaintiffs. In aid of this

contention is invoked the rule that where something remains to be done by the seller to ascertain the identity, quantity, or quality of the article sold, or to put it in the condition which the contract requires, the title remains in the vendor until the condition be complied with. The appellant cites a number of authorities which, he urges, so apply this rule as to make it applicable to the case here presented. It is said in *Groat v. Gile*, 51 N. Y. 431, that this "rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of determining the total value thereof at certain specified rates, or a designated fixed price." This distinction is recognized and enforced in *Crofoot v. Bennett*, 2 N. Y. 258; *Kimberly v. Patchin*, 19 N. Y. 330; *Bradley v. Wheeler*, 44 N. Y. 495. In *Crofoot v. Bennett*, supra, the court say: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass." This expression of the court is cited with approval in *Burrows v. Whitaker*, 71 N. Y. 291, in which case, after a full discussion of the authorities, the court approved the rule as laid down in *Groat v. Gile*, supra. Now applying that rule to the facts in this case, nothing remained to be done in order to identify the goods sold; because while, out of a larger lot, 238 bags of coffee were disposed of, nevertheless, as appears from the complaint and the testimony adduced, the bags were so marked that there was no difficulty about identifying the particular bags sold. There remained, therefore, nothing to be done except to weigh the coffee for the purpose of ascertaining the purchase price; for whether the 238 bags of coffee should prove to weigh more or less than the parties anticipated was not of any consequence. Whatever should prove to be for that number of pounds J. K. Huston & Co. had agreed to pay. This case, therefore, does not come within the rule contended for by the appellants, but, in its aid, is governed by the principle enunciated in *Groat v. Gile*. Having reached the conclusion that the title and the possession passed to J. K. Huston & Co., it becomes unnecessary to consider any of the other questions discussed, for the plaintiffs are without title upon which to found the right to maintain an action. The judgment appealed from should be affirmed. All concur.

MALTBY et al. v. PLUMMER.

(40 N. W. 3, 71 Mich. 578.)

Supreme Court of Michigan. Oct. 19, 1888.

Error to circuit court, Bay county; S. M. Green, Judge.

Two actions of assumpsit, by Alvin Maltby, W. Irving Brotherton, Henry N. Watrons, and Orville A. Watrons, assignees of Smith & Guilford, to recover money due on a lumbering contract. The actions were consolidated and tried by a jury. Verdict for plaintiffs for \$11,080.77, and judgment thereon. Defendant brings error.

Tarsney & Weadock, (T. A. E. & J. C. Weadock, of counsel) for plaintiff in error. J. L. Stoddard, (B. Hanchett, of counsel) for defendants in error.

LONG, J. The plaintiffs began two suits in the circuit court for the county of Bay against the defendant on the 16th day of November, 1885,—one by declaration containing the common counts only, and to which declaration was appended a copy of a promissory note given by defendants to plaintiffs on September 2, 1886, for \$2,164.11, payable 30 days after date, and the other by summons, in which a declaration containing two special counts and also the common counts were afterwards filed. These two suits were tried as one case. In these special counts a copy of a contract, dated July 17, 1885, made between Smith & Guilford plaintiffs' assignors, and the defendant is set forth. This contract provides substantially: (1) Said second parties [Smith & Guilford] agree that they will skid, haul, and deliver upon the cars of the Michigan Central Railroad Company at the Ogemaw village switch at Ogemaw village, Ogemaw county, Mich., all the merchantable white pine logs that said first party shall deem proper for the Saginaw market, situate and being upon sections 21 and 28, town 22 N., range 1 E., Michigan, at and for the price of \$2.50 per thousand feet. Also, that they would skid, haul, and deliver at the mill of said first party [Mr. Plummer] at Ogemaw village aforesaid, all the remainder of the white and Norway pine and hemlock standing and being upon said sections, at and for the price of \$2.30 per thousand feet; (2) that they will deliver said logs in sufficient quantities to keep the saw-mill of said first party constantly supplied with logs for sawing purposes at Ogemaw village, and place the same upon skids at said mill, keeping logs of particular lengths by themselves; (3) that they will deliver of said logs required by said first party for the Saginaw market not less than three million, nor more than five million, feet between the date of this contract and the 1st day of December, A. D. 1885; (4) that he will suspend operation from said 1st day of December next until the 1st day of April, 1886, or until said first party shall have time to cut and save such timber as may have been damaged by fire upon lands owned by him in the neighbor-

hood of said above sections; (5) that he will board the men of said first party engaged in cutting said timber free of cost; (6) that they will do all such work in a good and workmanlike manner and use all due diligence in delivering and forwarding the timber intended by first party for the Saginaw market upon the recommencement of operations in the spring of 1886 and thereafter. In consideration whereof first party agrees: (1) that he will pay said second parties for skidding, hauling, and delivering logs intended for Saginaw market, \$2.50 per thousand feet, etc.; (2) that he will allow said second parties the use of all the railroad cars and equipments now belonging to said railroad running to and from said lands to do such work; (3) that he will cut a sufficient amount of timber from said lands per day to mutually assist said second parties in doing said work, and keep said mill supplied with logs, and that he will keep a sufficient space clear for the unloading of the same, and the care of such logs after unloaded, so as not to delay said second parties in delivering the same. The logs were to be sealed by a competent scaler to be agreed upon by the parties, each party to pay one-half of scaler's wages. This contract was signed by defendant Plummer and by Smith & Guilford. The defendant pleaded the general issue, and gave notice of set-off, and also notice of several matters of defense. The parties subsequently entered into a stipulation covering certain matters of account and showing that the plaintiffs and their assignors had earned in skidding, hauling, and delivering logs, \$52,570 02

Due plaintiffs for camp supplies
and due bills, 339 14

For certain items of interest and
protest fees, 86 13

Making a total for which plaintiffs were entitled to credit of, . . \$52,995 29

The amount for which it was stipulated the defendant is entitled to credit is, \$41,890 88

Thus leaving a balance, exclusive of interest, prima facie due the plaintiffs according to stipulation, of \$11,104 41

In addition to this balance and interest thereon the plaintiffs claimed in their declaration and at the trial damages for the increased expense in skidding occasioned by the manner in which the cutting was done by the defendant in skipping or moving about from place to place instead of cutting the timber substantially clean as the work progressed, which it was claimed is the usual and customary manner in which timber is cut upon lands that are being lumbered. The plaintiffs also claimed damages caused by the alleged failure of the defendant to "keep a sufficient space clear for the unloading" of the logs, and to take care of them "after unloaded, so as not to delay said second party in delivering the same."

They also claimed damages for alleged failure of defendant at certain times to cut the timber fast enough to enable them properly to do the work, but no question arises upon this branch of the case. The declaration alleges the assignment of the contract declared upon from Smith & Guilford to the plaintiffs. Defendant, in his notice of recoupment, alleged and insisted upon the trial that plaintiffs and their assignors did not perform the contract sued upon; that they failed and neglected to load 5,000,000 feet of logs for the Saginaw market before December 1, 1885; that, by reason of the default in the delivering of said logs for the Saginaw market, the expense of hauling, taking care of, and receiving them was largely increased; that they failed and neglected to deliver on the cars of the Michigan Central Railroad Company at Ogemaw village all the white pine saw logs suitable for the Saginaw market, but on the contrary delivered logs that were coarse and unsuitable for the Saginaw market, thereby increasing the expense of handling the coarse logs, including the freight, to a large amount; that, by the admixture of coarse logs with the white pine logs suitable for the Saginaw market, it depreciated the value of the logs suitable for the Saginaw market to a large amount; that they failed and neglected to furnish a sufficient quantity of logs to keep defendant's mill running, and by reason thereof defendant was compelled to and did shut down his saw-mill at Ogemaw village a large number of times, and was compelled to keep a large crew of men idle, and was thereby unable to put upon the market his said lumber, and was unable to fill his orders or perform contracts entered into by him, and thereby lost great gains and profits; that they did not regard the terms of said contract whereby they agreed to keep logs of particular lengths upon skids by themselves at defendant's saw-mill, but that they piled upon skids at the mill of defendant logs of all lengths, including hard wood, hemlock, and pine, both white and Norway; that at the time of making said contract, and during its continuance the defendant was engaged in the manufacture of special bills; that his mill is what is known as a special bill timber mill; that it was in the contemplation of the filling of such special orders that the contract declared on was entered into, and that plaintiffs and their assignors had full knowledge of these facts, and that by reason of their failure to so pile said logs he was compelled to saw his logs into lumber of miscellaneous lengths, and was unable to fill special orders and contracts, and was compelled to cancel numerous contracts and orders entered into by him; that the lumber manufactured from the logs, by reason of being so mixed and sawed into miscellaneous lengths, was rendered almost valueless; that he was deprived of great gains and profits he would have enjoyed had logs of particular lengths been piled at his said saw-mill in separate lengths from each other; that by reason of the admixture of the logs he was

compelled to and did ship a large quantity of the lumber green which brought a much smaller price by reason of having been placed on the market green, and the cost of transportation was greatly increased; that they did not remove to defendant's mill at Ogemaw a large quantity of saw logs cut clean by them as they went, but left a large amount, about 2,000,000 feet, on the skids in the woods and on the ground, which by reason of being so left subject and exposed to the weather became rotten, worm-eaten, and greatly damaged; that a large quantity, some 500,000 feet of said logs, by reason of being so left in the woods, was burned by forest fires. Defendant further claimed that neither plaintiffs nor their assignors built a suitable and proper railroad track and spurs in suitable places, but attempted to construct a railroad track and spurs over which to convey said logs from said land in unsuitable, improper and impracticable places; that a portion of said railroad track and spurs was abandoned and could not be used; that other tracks and spurs were built in their stead, and that while attempting to operate said imperfect and improperly constructed railroad, large quantities of said saw logs accumulated along the line of said railroad track and spurs, and were there left and abandoned and by reason thereof became valueless to defendant; that the plaintiffs and their assignors failed to properly use and manage a certain steam locomotive belonging to defendant, and included in the terms of the contract declared upon; that said locomotive was injured and damaged, and that in all, by reason of the neglect and failure of the plaintiffs and their assignors, defendant was damaged to the amount of \$50,000. The jury returned a verdict in favor of the plaintiffs for the sum of \$11,080.77, and defendant brings error.

The record contains substantially all the evidence in the case. The case was fully submitted by the court to the jury upon the respective claims of the parties for damages growing out of this contract under the special counts of the declaration. It is now claimed by defendant's counsel that the stipulated amount, aside from these respective claims for damages, being \$11,104.41, is so near to the amount of the verdict rendered by the jury of \$11,080.77, that it is evidence that the jury did not allow damages to the plaintiffs under their declaration, nor did they allow any damages by way of recoupment to the defendant in finding the amount of their verdict. One hundred and fifteen errors are assigned. The case was very fully tried, and a large number of witnesses examined, and a large amount of testimony taken. The charge of the court is very full and explicit upon the claims of the respective parties. Some 30 of the assignments of error relate to the refusal of the court to permit certain questions put either upon the direct examination of defendant's own witnesses or upon the cross-examination of plaintiffs' witnesses to be answered,

and some 49 of the assignments of error relate to the admission of evidence offered by plaintiffs under objection of defendant's counsel. The other assignments of error relate to the refusal of the court to charge as requested by defendant's counsel and to the charge as given. At the close of the testimony the defendant requested the court to charge the jury: "First, By the terms of the contract between Smith & Guilford and the defendant dated July 17, 1885, Smith & Guilford were bound to deliver upon the cars of the Michigan Central Railroad at Ogemaw village switch all the merchantable white pine on sections twenty-one and twenty-eight, town twenty-two north, range one east, that defendant should deem proper for the Saginaw market. If, from the evidence, you find that Smith & Guilford or plaintiffs delivered, among the white pine logs that defendant deemed proper for the Saginaw market, against the protest of the defendant, coarse and cull logs that defendant did not deem proper for the Saginaw market, the defendant is entitled to recover such damages as he sustained by reason of such default." Error is assigned upon the refusal of the court to give this request in charge to the jury specifically. The court, in its general charge to the jury, fully covered this question, and, as we think, very fairly. Among other things in relation to this part of the case, the court stated to the jury: "Under this contract both parties had a duty to perform. Mr. Plummer would have no right to come in here and say: 'I deem certain logs proper for the Saginaw market and certain other logs not proper for that market, but these plaintiffs delivered logs that I deem not suitable for that market,' and claim damages unless he shows that he had indicated to them in some proper manner what logs he did deem suitable for that market. * * * If these men, in violation of their contract and their good judgment, and the judgment which they ought to have applied to the distinction which he pointed out to them as their guide, if they disregarded it, and sent logs to Saginaw that they had reason to suppose Mr. Plummer did not deem proper for that market, then they are liable for the consequences and the damages that resulted to him from securing that kind of logs there. But if he left it to the judgment of these men, and these men exercised that judgment fairly and honestly, he must be bound by that judgment. But if they frequently disregarded his directions, and did put timber upon the cars and send it to Saginaw that they knew was not suitable for that market, and knew that he deemed unsuitable, then they ought to pay damages." It is clear by the contract that defendant was required to designate the logs which were to go to Saginaw. He should do it in such manner as it would be profitable for plaintiffs to work by. If he left it to plaintiffs' judgment, or to the judgment of the scaler or foreman, and gave only a general description, so that it involved judgment, and that judgment was fairly exercised, he could

not complain, and we think this part of the charge fully covered all that defendant had any right to ask. Defendant further requested the court to charge: "If you find from the evidence that plaintiffs' assignors did not keep defendant's mill at Ogemaw village constantly supplied with pine logs for sawing purposes, the defendant is entitled to all damages sustained by him by reason of such failure." This the court also refused to give. The claim made by the notice under his plea does not set forth any particular bills lost. His claim is that he might have obtained orders for special bills. He does not name a single bill which he thus failed to get. The claim is presented in no other than the most speculative way, and does not present a fact to be tried as to damages. The court instructed the jury upon this question, and we find no error in those instructions. The case in principle falls directly within the ruling of this court in *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640. Defendant further requested the court to charge the jury: "Keeping logs of particular lengths by themselves in the contract of July 17, 1885, means that logs of different lengths should be placed on skid-ways at defendant's mill, each length separate from every other length. As an illustration, all logs twelve feet in length together, all logs fourteen feet in length together, and so on throughout the various lengths of logs under the contract. If they were not delivered, so that logs of particular lengths were kept by themselves, the defendant is entitled to recover damages by reason of this breach of the contract." The contention of the defendant is that the random logs, that is logs of different lengths, though cut for bill stuff, should have been separated by their lengths at the mill, and put on different skid-ways at the mill, and because that was not done the defendant has suffered damages which he is entitled to recover. The contract cannot be so construed, and it is apparent from the conduct of the defendant and his employes that no such construction was thought of at and during the time the work was in progress. The logs cut varied in length from 12 to 36 feet, and it would have required 13 different skid-ways at the mill to place separately these different lengths of logs. It was the duty of defendant to provide these skid-ways, and as appears by the evidence only two were provided for long timbers, and defendant's foreman directed them placed on these skid-ways. The language of the contract itself does not bear any such construction. The language in the contract "keeping logs of particular lengths by themselves" was employed to designate a class, and conveys the same idea as the words "special lengths." If the intent had been to keep each length of logs by itself, that language would have been used. It is an idea easy to express. The actual business of lumbering about which the contract was made does in fact make use of two general classes, viz., the usual or customary lengths, which are from 12, to 22 feet, and cut so as

to save timber, and lengths which are cut with reference to particular bills or orders. There can be no doubt that it was intended by the contract that the logs for bill stuff should be kept by themselves and the other classes of logs by themselves. This was the interpretation given by the court to the contract, and we think it is the true construction.

Some contention was had upon the trial, and considerable evidence introduced by each party, under a claim made by the plaintiffs that the defendant, in cutting the timber, did not do so in the usual and ordinary way, but went from place to place so that plaintiffs were put to large expense in hauling. There is no provision in the contract as to the manner in which the plaintiffs should do the work except that it should be done in a workmanlike manner, and keep the mill supplied. The defendant was to do the cutting in such manner as to mutually assist the plaintiffs "in doing the work and keeping the mill supplied." Under these terms it was no matter how fast logs were cut, or what kinds. The plaintiffs fulfilled by keeping the mill supplied with every kind of logs, and might elect for themselves which kind to load first and from what points to work to the best advantage for themselves. The defendant claimed the right to skip about, cut here and there, and compel hauling in the same way. The plaintiffs denied this, and claimed that it added to the expense in hauling. The contract was made in reference to the work of logging as actually and customarily done, unless it could be otherwise shown by competent evidence. The plaintiffs gave evidence tending to show the custom was to cut clean. The defendant gave evidence tending to show an understanding, before and when the contract was made, to cut as he did. The plaintiffs gave evidence in rebuttal, and the whole question was submitted to the jury by the court in its general charge, and gave the defendant the benefit of this understanding if they so found. We think the matter was fully and fairly submitted to the jury, and the defendant has no reason to complain of this part of the case. The defendant requested the court to charge: "If you find from the evidence that defendant, by order of Guilford, paid to Angus Bedour the sum of \$615.32 for work done by him for Guilford under verbal contract, between defendant and Guilford, the defendant is entitled to credit for such amount as payment." The court refused this request, but charged the jury, substantially: "Here is an amount claimed to have been paid by Mr. Plummer to Bedour for skidding a quantity of logs that Mr. Guilford was under contract to get out. The claim is for payment made by defendant for loading these logs. It is conceded that Mr. Plummer did pay for the skidding and hauling. The only dispute is whether he was authorized to pay it. * * * You may have no sort of doubt that this payment was made by Mr. Plummer, who had no sort of interest in paying it to Mr. Bedour, because he under-

stood his authority and the direction. Mr. Bedour may have received it with that understanding, and it may be supposed it is suggested that Mr. Plummer would not have paid this man Bedour unless he thought and believed he was authorized by Guilford to do so. And Guilford's good faith is attested in the same way, to a certain extent. He testified that he paid Bedour, and Bedour received from him some four hundred and ninety-four dollars of this same amount. What you may think of Bedour for receiving from these two parties double payment for his labor is another question. * * * The court, in another portion of its charge, stated to the jury: "Assuming that these witnesses are equally honest, and perhaps you may be satisfied they are, it indicates that there was an entire misapprehension between the parties." It appears from the record that Plummer and Bedour testified that Guilford authorized this payment, while Guilford denied giving Plummer any such authority. Plummer testified that he paid Bedour \$615.32 for loading the logs, and that that amount included nothing but for logs loaded under the contract, and that the payment was directed by Guilford in the presence of Bedour. Mr. Bedour testified that Plummer was at Ogemaw, and that he went down with him to West Branch. That the conductor held the train at his request. He went to the hotel, and got Guilford to come down to the train, and talk the matter over with Plummer. That Plummer was to pay him. Mr. Plummer asked Guilford if he should pay Bedour for the work, and he said, "Yes." Mr. Guilford denied making any such statement, or ever authorizing Plummer to pay for loading those logs. The issue was thus made between the parties, and it was a question of fact for the determination of the jury. Defendant's claim is that the court voluntarily passed upon one of the most important questions of fact in the case, and clearly informed the jury what his opinion of the testimony upon the payment was. That this statement of the court was a finding of fact that, conceding both parties to be equally honest, they misapprehended each other. Another claim is also made that defendant's case was prejudiced by the remarks of the court upon the witness Bedour in that the court said, "What you may think of Bedour for receiving from these two parties double payment for his labor is another question," as Bedour had testified that he had done other work for Guilford, and that this \$615.32 included no part of the other work. Mr. Bedour testified: "This work I did for Mr. Guilford was on that deal, for sections 10 and 11. I had a separate transaction with Mr. Guilford, apart from that, but this was all done on sections 10 and 11. The payments that I have received from Mr. Guilford and Mr. Plummer pay me in full for all the work I did for Guilford on sections 10 and 11. It does not overpay me." It is evident that Bedour's testimony was imperient upon this

\$615.32 item. Plummer claimed to have paid it under authority from Guilford, and claimed a credit for it on this account. Guilford denied giving any such authority to Plummer, and further insisted that he had paid that item for the identical work to Bedour himself. Bedour was called by defendant, and gave testimony squarely contradictory to Guilford, and claiming that, while Guilford paid him the \$615.32, it was for other work done for him, and that what he received from Guilford and Plummer only balanced his claim, and he was not overpaid. The remarks of the court "What you may think of Bedour for receiving from these two parties double payment for his labor" would naturally and necessarily have great weight with the jury. It was an expression of doubt by the court as to the honesty of Bedour for receiving double pay. It must have made an impression upon the minds of the jury, which they would carry into the jury-room, and where the case was so evenly balanced between Plummer and Guilford, who so squarely contradicted each other upon the question of the authority for the payment. Bedour's testimony was of much moment and might be decisive of the question. We think this remark prejudiced the defendant's case upon this \$615.32 item. We think,

also, the court was in error in charging the jury that there was an entire misapprehension between the parties upon this question of authority to Plummer to pay the \$615.32. The testimony was direct and positive, and plainly irreconcilable, and it was a question of fact for the jury to determine which was right. If Plummer and Bedour were right in their version of it, then Plummer was entitled to the credit, and if Guilford was correct, the credit should not have been allowed. In view of the issue made in the case, by the pleading, the court allowed great latitude in the examination of witnesses. We think this was proper, and we find no error in the record upon the reception or rejection of evidence. The case was fully tried and submitted to the jury under a very full and fair charge by the court. We find no error in the construction given to the contract by the court. The only error we find in the case relates to this \$615.32 item, and in the charge of the court upon that subject we think there was error. The judgment of the court below must be reversed, with costs, and a new trial ordered.

SHERWOOD, C. J., and CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

ALLARD v. GREASERT.

(61 N. Y. 1.)

Commission of Appeals of New York. Sept. Term, 1874.

Action for goods sold and delivered. Defendant firm orally agreed with an agent of plaintiffs to buy by sample the following bill of hats and caps:

Of case No. 361, $\frac{1}{2}$ doz. child's Leghorn sylvans, at \$11 per doz.	\$ 5 50
Of case No. 312, one doz. harvest hats, at.....	4 50
Of case No. 371, half doz. Panama hats, at.....	28 50 a doz.
Of case No. 372, half doz. Panama hats, at.....	36 00 a doz.
Of case No. 326, one doz. palm leaf hats, at.....	2 50 a doz.
Of case No. 324, one doz. palm leaf hats, at.....	3 00 a doz.
Of case No. 329, one doz. white Glenwood, at.....	15 00 a doz.
Of case No. 159, one doz. black Alpine, at.....	24 00 a doz.
Of case No. 309, one doz. Leg. harvest, at.....	3 25 a doz.

The samples were shown by the agent, and the prices of the different styles named, and a memorandum made by the agent of the number of each kind purchased. No memorandum was made in writing, and signed by either party. When the goods were sent, by express, as ordered, defendants refused to receive them because the one dozen harvest were in some slight particular different from the samples shown. Defendants moved for a nonsuit because (1) "that the agreement under which the plaintiffs seek to recover is within the statute of frauds, and void; (2) that the order for the goods constitutes one entire contract, and the plaintiffs have failed to fulfill, on their part, to deliver the harvest hats of the description ordered; that, by reason of said failure, the defendants had a right to refuse to receive any of the goods sent." The court nonsuited plaintiffs on the last ground.

Daniel Wood, for appellants. Bowen & Pitts, for respondents.

EARL, C. The judge at the circuit regarded this as an entire contract of sale, and not severable; and if he was right in this, he properly nonsuited the plaintiffs upon that ground. If it was an entire contract, within the meaning of the law, the plaintiffs could recover only by showing entire performance, by a full delivery of all the articles purchased. But it is not necessary, in this case, to determine whether this was an entire or a severable contract, because the defendants also moved for a nonsuit upon the ground that the contract of sale was void under the statute of frauds. Although the judge did not place the nonsuit upon this ground, it may be considered here. He nonsuited the plaintiffs, and even if he gave a wrong reason for it, and placed it upon the wrong ground, the nonsuit may be upheld upon any ground appearing in the case. *Curtis v. Hubbard*, 1 Hill, 336; *Simar*

v. Canaday, 53 N. Y. 298; *Deland v. Richardson*, 4 Denio, 95.

Even if this were a severable contract so far as relates to the performance of the same, within the meaning of the statute of frauds it is an entire contract. The reasons for holding it to be such are clearly set forth in *Baldley v. Parker*, 2 B. & C. 41, and *Story, Sales*, § 241. This, within the meaning of the statute of frauds, is a contract for the sale of goods for the price of \$50 or more, and as there was no note or memorandum or payment, the question to be determined is, whether the goods were accepted and received by the buyers so as to satisfy the statute. By the terms of the contract, the goods were to be delivered to the Merchants' Union Express, to be carried to the defendants, and they were so delivered. It is well settled that when there is a valid contract of sale, a delivery to a carrier, according to the terms of the contract, vests the title to the property in the buyer. It was decided in *Rodgers v. Phillips*, 40 N. Y. 519, that a delivery, according to the contract, to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance as to answer the statute of frauds. But it has been held that when the goods have been accepted by the buyer, so as to answer that portion of the statute which requires acceptance, a delivery to a carrier selected by the buyer will answer that portion of the statute which requires the buyer to receive. *Cross v. O'Donnell*, 44 N. Y. 651. So far as I can discover, it has never yet been decided in any case that is entitled to respect as authority, that a mere carrier designated by the buyer can both accept and receive the goods so as to answer the statute. *Benj. Sales*, 124. The cases upon this subject are cited and commented upon, and the principles applicable to the question are so fully set forth in the two recent cases above referred to that no further citation of authorities or extended discussions at this time is important. It will be found by an examination of the authorities, that in most of the cases where a delivery to a carrier has been held to satisfy the statute of frauds, there had been a prior acceptance of the goods by the buyer or his agent. A buyer may accept and receive through an agent expressly or impliedly appointed for that purpose. There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act requiring the exercise of no discretion. But there is no reason for holding that the buyer in such case intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents knew nothing. This case furnishes as good an illustration as any. The goods were boxed; the carrier could know nothing about

them; and its agents had no right to unpack and handle them. Its sole duty and authority was to receive and transport them. In such a case, it would be quite absurd to hold that the carrier had an implied authority from the buyer to accept the goods for him. If the buyer does not accept in person, he must do it through an authorized agent. Here it is

not claimed that there was express authority conferred upon the carrier to accept, and the circumstances are not such that such authority can be implied.

Upon this last ground therefore the nonsuit was proper, and the judgment must be affirmed, with costs.

All concur.

RUHL et al. v. CORNER et al.

(63 Md. 179.)

Court of Appeals of Maryland. Feb. 12, 1885.

Before ALVEY, C. J., and YELLOTT, STONE, MILLER, ROBINSON, IRVING, and BRYAN, JJ.

W. Irvine Cross and John K. Cowen, for appellants. Joseph C. France and John Prentiss Poe, for appellee.

IRVING, J. The appellee being a commission merchant in Baltimore, between the month of August, 1881, and the month of January, 1882, received consignments of flour from Oliver Merion, of Minneapolis, Minnesota, for sale upon commission. Upon the 21st of January, 1882, Merion shipped to Corner & Co., without order, a car-load of "Champion" flour, being one hundred and twenty-five barrels, by Milwaukee and St. Paul Railroad and Baltimore and Ohio Railroad via Chicago. On the same day he wrote Corner & Co. advising of this shipment, and naming a price at which Corner, his factor, should sell the same. No bill of lading was sent to Corner & Co.; but at the time of the shipment a shipping receipt was taken from the railroad for the flour, and that with a draft on Corner & Co. for five hundred dollars was placed in bank for transmission to Baltimore, but was subsequently withdrawn, and was never sent. Subsequent to the shipment to Corner & Co., Merion received an order for flour from Conrad Ruhl & Son of Baltimore, and decided to change the shipment and to send to Ruhl & Son this car of flour on their order. Accordingly, on the 24th of January, 1882, the railroad having been notified, its agent at Minneapolis telegraphed the Chicago agent to hold the car of flour, as Merion wished to change the consignment to Ruhl & Son. On the 30th of January, the original receipt was surrendered to the railroad agent at Minneapolis, and a bill of lading for the flour was taken out to Ruhl & Son. The agent on the 24th had taken steps to have the address of Corner & Co. removed from the car, and to have that of Ruhl & Son substituted. He telegraphed to Chicago directing this change to be made, but it was neglected, and the flour came through to Baltimore labeled for Corner & Co., and was delivered to them; the Baltimore agents of the railroad not being advised of the change of destination, and Corner & Co., as yet, having received no information of Merion's change of purpose, and the actual consignment, by bill of lading, to Ruhl & Son. The proof shows, that on the 24th of January, three days after the shipment spoken of, but before Corner knew of it, he wrote to Merion advising against further shipments unless Merion chose to ship a car of "Clematis" flour, without draft, as the margins on the flour still on hand were exhausted. On the 26th of January, Corner acknowledged the receipt of the letter telling him of the shipment of "Champion," promising it

should be sold for the best prices, and saying, "we note you have not made draft on this car, as it in anticipation of our request of the 24th to send us a car without draft to cover the margins on shipments now on hand."

Corner says in the testimony he sold the flour on the 9th of February, although on the 27th of February he wrote Merion he had received no offers, and does not apprise him of a sale until the 4th of March.

The bill of lading, though issued on the 30th of January, was dated back to the 21st of January to correspond with the actual shipment. This bill of lading in favor of Ruhl & Son, with draft on them for \$615, was presented by Merion to the Security Bank of Minnesota, and the draft was cashed by the bank, which sent both bill of lading and draft to the Bank of Commerce in Baltimore, at which bank Ruhl & Son paid the draft and received in consideration of such payment, viz., the bill of lading for the flour. Ascertaining the flour had been received by Corner, appellants in the latter part of February, or early in March, demanded payment for the same; and the Baltimore and Ohio Railroad also in March demanded the flour.

Upon this state of facts the question arises, who was entitled to this flour—the appellants, or the appellee? It is conceded that no bill of lading or invoice was ever sent to or received by Corner; whereas it is equally well established and not denied, that Ruhl & Son did receive a bill of lading, and did pay a draft on them for \$615 on it.

The appellants insist, that although the flour was originally shipped to Corner & Co., it was so shipped without their order, and that afterwards, and while it was in the power of the shipper to do so, the consignment was changed, and the flour was sold to Ruhl & Sons, to whom a bill of lading and draft were sent, and who paid therefor. They claim that title never passed from Merion to Corner & Co., but that it did pass to Ruhl & Son. The appellants further and strongly relied on the act of 1876, c. 262, in respect to bills of lading, and the effect of the possession of such bills of lading upon title. But the decision of this case does not involve any consideration by the court of the effect of the act of 1876 or what construction shall be given it; for there are well settled principles established and acted upon in very many cases, which will control the decision of this case irrespective of any act of assembly.

It is the well-settled law, that the delivery of goods to a common carrier for one who has purchased and who has ordered them, is a delivery to the purchaser, though it does not amount to an acceptance of them. 1 Benjamin on Sales, pp. 182 and 195. But it is equally well settled, that where goods have been shipped to one who has not ordered them, title does not pass to the consignee by delivery to the carrier, and the right to change the consignment and destination during the transportation remains in the shipper; and

this is so far the manifest reason that there is a want of the essential element of mutual assent to constitute a contract of sale. So that in all cases where goods are shipped upon the account of, and at the risk of, the shipper, this right remains in him. *The Francis* (Boyer, Master,) 8 Cranch, 418; *Mitchel v. Ede*, 11 Adol. & E. 888; *Scothorn v. Railway Co.*, 8 Exch. 340; 3 *Pet. Cond. Rep.* 1, S. 245, and notes; *Elliot v. Bradley*, 23 Vt. 217; *Hodges v. Kimball*, 19 Iowa, 577; *Hutch. Carr.* §§ 134, 337; *Blanchard v. Page*, 8 Gray, 285; and *Walter v. Ross*, 2 Wash. C. C. 286, Fed. Cas. No. 17,122. In this last case of *Walter v. Ross*, the subject was fully considered, and Judge Washington says, "the factor has no interest or property in the goods beyond his commissions, and, of course, cannot controvert the right of his principal. If, indeed, he be a creditor of the shipper, he has a contingent interest in virtue of his right of lien which the possession would give; but for the perfection of his right he must acquire and retain an actual possession of this property—constructive possession will not do."

The same principles are declared in *Grosvenor v. Phillips*, 2 Hill, 147, and in *Bank v. Jones*, 4 N. Y. 500. In *Bonner v. Marsh*, 10 Smedes & M. 376; *Chaffe v. Railroad Co.*, 59 Miss. 185; *Woodruff v. Railroad Co.*, 2 Head, 87, and several other Tennessee cases, the law is laid down more stringently, as against the factor, than the weight of authority justifies. There can be no doubt, upon the weight of authority, that if the factor have claims for advances against his principal, and it be expressly agreed, that goods shall be shipped to the factor to pay those advances, then, in such cases, the law makes the delivery to the carrier a delivery to the consignee, though a factor; and the appellee's counsel endeavor to bring the appellee within the operation of this rule as laid down in *Bailey v. Railroad*, 49 N. Y. 70, and *Straus v. Wessel*, 30 Ohio St. 211. But these cases are not analogous to the present one. In *Bailey's Case* it was decided that title had passed. The court said that the plaintiffs in that case "occupied the legal position of vendees after having paid the purchase money and received delivery of the goods." It is true, the court says, in addition, that it is not necessary to hold in that case that the plaintiffs occupied the position of vendees strictly; but still the decision is wholly based on the ground that "the actual agreement and transaction proved by two members of the firm, and uncontradicted, prevailed." It was because of the agreement expressly proved that title was held to have passed to the consignee on delivery to the carrier, and in that way the shipper's right to change consignment and destination was lost. The court say in that case, the goods were not sold outright to the consignee at specified price, but they were by agreement sent to him for sale, and that the proceeds should be applied to the payment of the debt; creating thereby the quasi relation of trustee, to whom,

for the purposes of the trust, the title passed. In *Straus v. Wessel*, 30 Ohio St. 211, the advances had been made on the particular lot of pork to be shipped, which, by express contract, was shipped to pay the indebtedness; and it was held, that under these circumstances, the delivery to the carrier was a delivery to the consignee, who, the court say, in such case, is in the position of purchaser, having paid for the goods.

If the present case by the proof, measured up in its facts to these last considered cases we should think the delivery complete so as to pass title unless the act of 1876 interposes an insuperable barrier to such a view, which the necessities of this case do not require us to consider. According to the facts of the case, which are undisputed, we think it very clear that there was no intention in the original shipment to pass the title out of the shipper, which, Judge Church says, in *Bailey's Case*, already considered, is the true test to be applied. There was certainly no contract that the flour should be shipped to pay the margins or advances on account of the goods still in Corner's hands and unsold. The flour was shipped without order from Corner & Co. The letter advising Corner of the shipment and naming the price at which he was to sell, bears evidence of its being an unsuggested shipment, and that Corner had been writing despondingly of flour prospects. Not a word was said in the letter about designing that shipment to pay former advances; and we are warranted in supposing he did not know that the margins on the flour still in his factor's hands were exhausted; for it does not appear that Corner & Co. ever informed him, until he did so by the letter of the 24th of January, at which time the flour was on its way to Baltimore, and could not be received until some days afterwards. In fact, the proof shows that Merion thought a considerable balance was due him from Corner & Co. on the previous shipments. As already stated, when the flour was shipped to Corner & Co., a draft for \$500 was drawn and put in bank for transmission to Baltimore for presentation to Corner & Co., but it also appears it was subsequently withdrawn and was never sent, because Merion had received an order from C. Ruhl & Son for flour, and determined to change the consignment, and send this flour to Ruhl & Son instead of to Corner & Co. The Chicago railroad agent was telegraphed by the Minneapolis agent to hold the flour for this change to be made before Corner & Co. sent their letter of the 24th of January, suggesting there was an exhaustion of margins, and if any flour should be shipped, that it be shipped without draft. It is clear, therefore, there was no mutual assent between Merion and Corner & Co. to the flour being sent by Merion to Corner & Co. to pay for previous advances on former orders. Without such assent, of course there was no contract. Unfortunately, the carding of the car, by the neglect of the railroad or of

Merion, was not changed, and the flour came through to Baltimore, and was delivered to Corner & Co., and this complication has produced all the trouble. If the flour was Merion's when Corner received it, of course Corner's liens for previous advances would at once attach, and Merion would have to pay them to release the flour; but if, on the other hand, Merion had, while the flour was in transitu and at his risk, parted with the title, and the flour was no longer his, the liens of Corner & Co. would not and could not attach. We have seen that when the flour was shipped it was sent to Corner without order, and the carrier was Merion's agent and not Corner's; and that nothing afterwards occurred to change the relation of the carrier and make it the agent of Corner & Co. is clear; for the sale to Ruhl & Son was made before Corner & Co. had ever made their preposition of the 24th of January. Suppose, instead of the flour being received by Corner & Co., it had been received by Ruhl & Son, could Corner & Co. have maintained replevin or trover for the flour? It certainly could not be contended, upon the proof that they could. If not, then Corner & Co. had no title, and Ruhl & Son had acquired title and the right to sue Corner & Co. If Corner & Co. have been misled to their injury, they must look elsewhere for redress. What the law or equity would do, if the controversy was between Merion and Corner & Co., must not be considered to divert the mind from the rights of Ruhl & Son.

The court below erred in granting the defendant's prayer. It is entirely at variance with the law of the case, as we have declared it. The first prayer of the plaintiff was correct in principle, but it omitted some of the facts necessary for the jury to find. It ought to have submitted to the jury to find the fact, that the original shipment to the defendant was without his order, and was sent without bill of lading and actual draft on Corner & Co., and that before Corner & Co. received the flour from the carrier, the sale was made to Ruhl & Son. When these elements are in-

corporated in the prayer, it will be right. The second prayer was correctly refused, for it submits a question which, under our view, the jury had nothing to do with, inasmuch as the factor's authority was revoked by the sale to Ruhl & Son. It was unnecessary. The third prayer was correctly refused, for it claims as the measure of damages that which belongs to the action of trover, and not to the form of action adopted by the plaintiffs. In the action of assumpsit, in the absence of proof of actual sale of the goods to the defendant the plaintiff can only recover for the money had and received from the sale of the flour to the use of the plaintiff. The prayer was therefore inconsistent with the form of action.

The question raised by the first bill of exception needs no discussion. The proof tendered was wholly immaterial, and without bearing upon the issue. The previous admission of irrelevant testimony, without objection, did not render its rebuttal competent. There was, therefore, no error in its rejection.

The objection which has been raised by the appellee's counsel, that the first and second bills of exception are not sufficiently connected, by apt language, to entitle the court to look at the evidence in the first bill of exception, for the purpose of determining upon the correctness of the court's rulings upon the instructions, cannot be maintained. All the evidence was in, and the prayers were not intended to be mere abstractions. They were offered with reference to the proof, as their form shows. The most appropriate language is not used for connecting the two bills of exception, but we regard it as entirely sufficient. The case is similar to and covered by *Baltimore and Ohio Railroad Company vs. State*, use of *Fryer*, 30 Md. 47. The language used is, "all the testimony being in, the plaintiffs offered the following prayers." Reference to the testimony recited is manifestly made. It is equivalent to saying "there being no other testimony," or "this being all the testimony." The intention is too plain to be disregarded.

Judgment reversed, and new trial awarded.

LANE v. CHADWICK.

(15 N. E. 121, 146 Mass. 68.)

Supreme Judicial Court of Massachusetts.
Dukes. Jan. 9, 1888.

Exceptions from superior court, Dukes county; Hammond, Judge.

Action of replevin by plaintiff, Lane, against defendant Chadwick, a common carrier of goods. Trial in the superior court, without a jury, where the court found for the defendant, and the plaintiff alleged exceptions. The facts are stated in the opinion.

P. H. Hutchinson and C. G. M. Dunham, for plaintiff. H. M. Knowlton, for defendant.

MORTON, C. J. To maintain replevin, the plaintiff must show that, at the time she sued out her writ, she was entitled to the

immediate and exclusive possession of the goods replevied. *Collins v. Evans*, 15 Pick. 63; *Wade v. Mason*, 12 Gray, 335. The goods in suit were delivered to the defendant, who is a common carrier, by the consignor in Boston, to be transported to the plaintiff. They were in two boxes, securely nailed up, and were accompanied by an itemized bill. The defendant was instructed to deliver the goods to the plaintiff upon the payment of the bill by her in cash. The delivery to the carrier was not a delivery to the plaintiff. He was not her agent, but the agent of the consignor. *Bank v. Bangs*, 102 Mass. 291. Until he delivered the goods to her no title or right of possession would pass to her, and it is immaterial whether he rightfully or wrongfully refused to make the delivery. At the time she replevied the goods, she had no title or right of possession. Exceptions overruled.

HIGGINS v. MURRAY.

(73 N. Y. 252.)

Court of Appeals of New York. 1878.

Action for work and materials. Defendant employed plaintiff to manufacture some circus tents, within a specified time, from material furnished by plaintiff. No place of delivery or price was specified. Defendant afterwards requested plaintiff, by letter, to ship the tents to him at Lewiston. He shipped them by steamboat, via Portland, C. O. D., and they were destroyed by fire on the way.

CHURCH, C. J. The action is not strictly for the sale of the article manufactured, but for work, labor, and materials, performed and used in its manufacture (*Mixer v. Howarth*, 21 Pick. 205); and hence is not within the statute of frauds. It is undisputed that the plaintiff performed his contract, and if the defendant had refused to take the tents, an action upon the agreement would have been sustained. *Crookshank v. Burrell*, 18 Johns. 58. There is some confusion in the authorities as to when the title passes to the purchaser in such cases. In *Andrews v. Durant*, 11 N. Y. 35, Denio, J., lays down the rule, that in such a case "the title does not pass until the article is finished and delivered, or at least ready for delivery, and approved by such party;" and there are other authorities to the same effect. *Grippen v. Railroad Co.*, 40 N. Y. 36; *Comfort v. Kiersted*, 26 Barb. 473.

It is urged in this case that the title did not pass, for two reasons: First, Because there was no acceptance; and, second, Because the plaintiff shipped the property C. O. D., thereby refusing to deliver until the value was paid. This last ground was sustained in *Baker v. Bourcicault*, 1 Daly, 21, where certain cards were ordered to be sent to New Orleans, and were sent C. O. D., and lost at sea.

The important question to determine is when the liability of the defendant attached. If the article had burned during the progress of construction, it is clear that no action would lie, for the reason that the contract was an entirety, and until performed, no liability would exist. And this rule I apprehend would apply when the contract is to make and deliver at a particular place, and loss ensues before delivery at the place, and for the same reason. But when the contract is fully performed, both as it respects the character of the article, and the delivery at the place agreed upon or implied, and the defendant is notified, or if a specified time is fixed, and the contract is performed within that time, upon general principles I am unable to perceive why the party making such a contract is not liable. One person agrees to manufacture a wagon for another in thirty days for \$100, and the other agrees to pay for it. The mechanic performs his contract. Is he not entitled to enforce the obligation against the other party, and if

after such performance the wagon is destroyed without the fault of the mechanic, is the undischarged liability canceled? It does not depend upon where the technical title is, as in the sale of goods. It was upon this principle substantially that *Adlard v. Booth*, 7 Car. & P. 108, was decided. The question was submitted to the jury whether the work of printing books was completed before the fire. Suppose in this case that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. This was in the nature of a pledge or mortgage. Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of and for the benefit of the defendant (assuming that it was done in accordance with the directions), it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract.

If the plaintiff had agreed to deliver the tent in Lewiston as a part of the contract for its manufacture, he could not have recovered anything; but this was not a part of the contract. Suppose the tent had reached Lewiston in good order and the defendant had refused to accept or receive it, his liability would be clear and complete. As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action. This is a case of misfortune where one of the parties without fault must incur loss, and it seems to me very clear that the legal right is with the plaintiff. A point is made that the property was not properly shipped. It was directed to the defendant at Lewiston, and was forwarded to Portland on a steamer running to that place. It does not appear but that was the usual mode of shipment to Lewiston, and the deviation would impose the obligation upon the consignee at the latter place to forward the property by a connecting carrier. We cannot presume that there was no connecting route, and if we could, it is difficult to see what else the plaintiff could have done. At all events it does not appear that the loss was occasioned by the defendant's negligence or fault in not properly shipping the goods.

The judgment must be affirmed.

All concur except ALLEN and MILLER, JJs., absent.

Judgment affirmed.

FLEMING v. COMMONWEALTH.¹

(18 Ad. 622, 130 Pa. St. 138.)

Supreme Court of Pennsylvania. Nov. 4, 1889.

Error to court of quarter sessions, Mercer county.

The plaintiff in error, Joseph Fleming, being a wholesale liquor dealer, licensed and carrying on business in Allegheny county, sold and sent from his place of business, C. O. D., to Mercer county, where he had no license, liquors ordered by persons in the latter county. For this he was, at the court of quarter sessions of Mercer county, indicted, tried, convicted, and sentenced for selling liquor therein without a license. He now brings error.

George Shiras, Jr., and William S. Pier, for plaintiff in error. *G. W. McBride, J. A. Stranahan, and S. H. Miller,* for the Commonwealth.

GREEN, J. In the case of Garbracht v. Com., 96 Pa. St. 449, which was an indictment for selling liquor without license, we hold that "the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him." In that case the order for the liquor was solicited and obtained by the defendant in the county of Mercer, but was sent to his principal, who was a liquor dealer in the county of Erie. The order was executed by the principal, who, in the county of Erie, at his place of business, separated or set apart from his general stock the liquor ordered, and delivered it to a common carrier to be forwarded to its destination in Mercer county. We decided that this was no violation of the law prohibiting sales without license, although neither the defendant, who was a traveling agent, nor his principal held any license for the sale of liquor in Mercer county. This decision was not changed in the least upon a subsequent trial of the same defendant on a different state of facts, as reported in 1 Penny, 471. In the case now under consideration the liquor was sold upon orders sent by mail by the purchasers, living in Mercer county, to the defendant, who is a whole sale liquor dealer in Allegheny county. The goods were set apart at the defendant's place of business in Allegheny county, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer county, and by the carrier transported to Mercer county, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the Case of Garbracht, *supra*, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts in the case which distinguish it from that of Garbracht.

It is claimed, and it was so held by the

court below, that, because the goods were marked "C. O. D.," the sale was not complete until the delivery was made; and as that took place in Mercer county, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was simply that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is that the price of the goods is to be collected by the carrier at the time of the delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser, under such an order; and it is beyond question that, so far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liabilities to the seller for the price of the goods if he pays the price to the carrier. The liability for the price is transferred from the seller to the carrier; and whether the carrier receives the price or not, at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the carrier, and he chooses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods. Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser, after getting all the parcels, should refuse to perform the condition upon which he obtained them, and in such circumstances the seller would be entitled to receive the goods. This was the case in *Henderson v. Lauck*, 21 Pa. St. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the seller. He authorizes the purchaser absolutely to pay the

¹ Dissenting opinion of Williams, J., omitted.

price to the carrier; and, if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is of course liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but, as he had received the goods from one who was authorized to deliver them, his right to hold them over as against the seller is undoubted. In other words, the direction embodied in the letters "C. O. D.," placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, where the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods, although, in point of fact, he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the pur-

chaser, and has no other effect upon the contract than any other term affecting the *factum* of delivery. It must be performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the contract between the parties, regarded as a contract for civil purposes only. The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller. The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier is *Higgins v. Murray*, 73 N. Y. 252. There the defendant employed the plaintiff to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D. was not inconsistent with, and did not affect, his right to enforce the defendant's liability. In the course of the opinion, Chief Justice Church said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. * * * Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of, and for the benefit of, the defendant, (assuming that it was done in accordance with the directions,) it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. * * *

As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is per-

fectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested, heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

In *Hutchinson on Carriers*, at section 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.] undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods." And again, in section 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty,—that of collection; and, if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal *status* of the parties results that the seller has a remedy for the price of the goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale; and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them, and not paid for them.

Thus far we have regarded the transactions between the parties in its aspect as a civil contract only; but, when viewed in its aspect as the source of a criminal prosecution,

the transaction becomes much more clear of doubt. It is manifest that, when the purchaser ordered the goods to be sent to him C. O. D., he constituted the carrier his agent, both to receive the goods from the seller, and to transmit the price to the seller. When, therefore, the goods were delivered to the carrier at Pittsburgh for the purpose of transportation, the duty of the seller was performed, as we have already seen, so far as he and the purchaser were concerned, and as between them the transaction was complete. The duty of transportation devolved upon the carrier, and for it he was, in one sense, the agent of the seller, as well as of the purchaser; but, as it was to be at the expense of the purchaser, the delivery to the carrier was a delivery to the purchaser; and this was ruled in *Garbracht's Case*. The injunction to the carrier to collect the money on delivery imposed an additional duty on the carrier, which the carrier was, of course, bound to discharge. This arrangement was a matter of convenience, both to the purchaser and the seller, relative to the payment and transmission of the price; but that is all. To convert this entirely innocent and purely civil conversation, respecting the mode of collecting the price of the goods, into a crime, is, in our judgment, a grave perversion of the criminal law, to which we cannot assent. As a matter of course, there is an utter absence of any criminal intent in the case. The defendant had a license. The sale was made at his place of business, and both the sale and delivery were completed within the territory covered by the license. If, now, a criminal character is to be given to the transaction, it must be done by means of a technical inference that the title did not pass until the money was paid; and thus that the place of sale, which in point of fact was in Allegheny county, was changed to Mercer county, where no sale was made. Even granting that, in order to conserve the vendor's lien, such a technical inference would be justified for the purposes of a civil contract, it by no means follows that the plain facts of the case must be clothed with a criminal consequence on that account. So far as the criminal law is concerned, it is only an actual sale without license that is prohibited. But there was no such sale, because all the essential facts which constitute the sale transpired in Allegheny county, where the defendant's license was operative. The carrier, being the agent of the purchaser to receive the goods, does receive them from the seller in Allegheny county, and the delivery to him for the purpose of transportation was a delivery to the purchaser. This is the legal, and certainly the common, understanding of a sale. The statute, being criminal, must be strictly construed; and only those acts which are plainly within its meaning, according to the common understanding of men, can be regarded as prohibited criminal acts. We cannot consider, therefore, that a mere undertaking on the part of the carrier

to collect the price of the goods at the time of his delivery to the purchaser, though the payment of the price be a condition of the delivery, can suffice to convert the seller's delivery to the carrier for transportation and collection into a crime. We therefore hold that the sales made by the defendant upon orders, C. O. D., received from the purchasers were not in violation of the criminal statute

against sales without license, and the conviction and sentence in the court below must be set aside. The judgment of the court of quarter sessions is reversed, and the defendant is discharged from his recognizance upon this indictment.

WILLIAMS, J., dissents.

* * * * *

AULTMAN, MILLER & CO. v. CLIFFORD.
(56 N. W. 593, 55 Minn. 159.)

Supreme Court of Minnesota. Oct. 27, 1893.

Appeal from district court, Traverse county; Brown, Judge.

Action on a contract by Aultman, Miller & Co. against Michael Clifford. Defendant had judgment, and from an order granting a new trial he appeals. Reversed.

A. S. Crossfield, for appellant. E. T. Young, for respondent.

BUCK, J. The plaintiff brought suit against the defendant in the district court for the sum of \$110, upon the following described instrument, viz.: "July 13th, 1891. I have this day ordered of Aultman, Miller & Co. one seven-foot Buckeye binder, for which I agree to pay one hundred and forty dollars,—note for one hundred and ten dollars, and his old McCormick binder; three fall payments, at eight per cent. The binder to be delivered on or before July 25th, 1891." Before the last-named date the parties substituted a six-foot binder, with bundle carrier, in the place of the seven-foot binder mentioned in the original order, but upon the same terms. The defendant refused to execute the notes, for the reason that the binder was not such as plaintiff represented and warranted it to be. In the month of December following, this action was commenced for the full amount of the three notes mentioned in the order. The defendant answered, and alleged that at the time of ordering said machine, and as part of the terms of the contract of said purchase, this plaintiff orally represented that he would furnish a binder, to be of good material, well made, light draft, and as good as any other machine manufactured for the purpose of cutting and binding grain, and that the binder so to be furnished would in fact cut and bind grain as well as any other machine manufactured for such purpose; and that defendant, relying upon such representations, was thereby induced to give such order. Upon the trial the evidence fully sustained the contention of the defendant, and the jury so found.

Before submitting the case to the jury, the plaintiff asked the court to instruct the jury to find a verdict for plaintiff, for the reason that the contract of sale in this case was in writing, and contained no warranty, and that, therefore, no oral warranty could be shown to vary the terms of the written contract. The court denied this motion, and the plaintiff excepted. Afterwards the plaintiff moved for a new trial, upon the minutes of the court, and it granted a new trial, holding that this case is controlled by the decisions of this court in the case of *Thompson v. Libby*, 34 Minn. 374, 26 N. W. Rep. 1, and *Kessler v. Smith*, 42 Minn. 494, 44 N. W. Rep. 794. Nothing in this opinion is to be construed as in any manner trenching upon the rule or doctrine laid down in those cases. This was an executory instrument.

The plaintiff had 12 days in which to furnish the binder, and the notes were to be executed in the future. It does not appear that the binder was in existence at the time the order was given. The defendant had no opportunity to inspect it or test its fitness or capability for doing the work for which he had ordered it. Now, a party receiving an order for a binder for doing a certain kind of work does not fulfill the conditions of the order by furnishing a binder of a different kind, and which will not do the work of the binder ordered. This is not the case of a binder being present at the time the order was given, and the seller then warranting the binder to do good work, but a case of an executory instrument, incomplete on its face, and not purporting to give the whole of the mutual executory engagements of the parties. The term "three fall payments, at eight per cent.," of \$110, is uncertain and ambiguous. The term "fall," when applied to the seasons of the year, is defined by Webster to mean "the season when the leaves fall from the trees." If the word "fall," as used in this order, means during the months of September, October, and November, then its ambiguity is apparent, for in such case it would be payable in some of those months; but whether September 1st, or the middle of October, or the last day of November, there is no legal way of determining. The plaintiff might claim that the payments would each be due the 1st day of September of each year, and the defendant with equally as much confidence claim that they would not be due until the last day of November of each year, and this ambiguity lead the parties into that very litigation which the law seeks to avoid, by requiring contracts to be definite and certain, or, in other words, complete contracts in themselves. If there was no time mentioned at all, then it would be understood by the parties to be a cash payment, or that delivery and payment were to be concurrent acts. In the case of *O'Donnell v. Leeman*, 43 Me. 158, an instrument of sale provided that the consideration should be one-third cash down, but it was silent as to when the rest should be paid, and it was held to be an incomplete instrument, and that no action could be maintained upon it at law or in equity. In this case there was not that legal delivery or acceptance of the property which passed the title to the defendant. There was an actual physical delivery of the binder to the defendant, and a temporary use of it by him, but he did not receive any substantial benefit from its use, and returned it to the premises of the plaintiff, where it was left, although plaintiff refused to accept it. A delivery of property, so as to pass the title to it and make the transaction an executed contract, should be a delivery of the property corresponding with the order or contract, which is a condition precedent to the vesting of the title in the vendee. 10 Amer. & Eng. Enc. Law, 104, 105. The writ-

ten instrument or order being incomplete, and not purporting on its face to express the whole of the mutual agreement of the parties, parol evidence was admissible to show an oral agreement on the part of plaintiff, which constituted a condition on which defendant gave the written order, and on which performance on his part was to depend, as that the binder should be of a certain quality. The jury must have found

that the plaintiff did not in this respect comply with his parol warranty and representations, and, if not, then there was not such legal delivery and acceptance of the binder by defendant as bound him to retain or pay for it. The oral evidence respecting the parol warranty was properly admitted, and the court below erred in granting a new trial. For this error the order granting such new trial is reversed.

HOOVER et al. v. MAHER.

(53 N. W. 646, 51 Minn. 269.)

Supreme Court of Minnesota. Nov. 12, 1892.

Appeal from district court, Big Stone county; Brown, Judge.

Action in the district court of Hennepin county by Abel Hoover and another, partners as Hoover & Gamble, against John Maher to recover for goods sold. After issue joined, the action was removed to the county of Big Stone, on demand for a change of venue, and submitted to the court on an agreed statement of facts. Findings were thereafter filed, and judgment ordered for defendant. From an order denying a new trial, plaintiffs appeal. Affirmed.

Keith, Evans, Thompson & Fairchild, for appellants. A. S. Crossfield, for respondent.

GILFILLAN, C. J. Action to recover for goods sold. The only question is, was there an executed, or only an executory, contract of sale? The plaintiffs' place of business was Miamisburg, Ohio; the defendant's, Beardsley, Minn. June 25, 1890, the defendant telegraphed plaintiffs: "I will take 4,000 lb. of your standard twine, at 13½, at Minneapolis, but don't want it shipped till about July 15th." June 28th plaintiffs wrote defendant: "Yours of 25th to hand. We are loading car to-day for Minneapolis, and will put in for you 4,000 lb. of our standard twine at 13½ c. frt., from Minneapolis. The car will arrive at Minneapolis about July 6th. If you do not want it shipped out at that time, please notify the Security Warehouse Company, Minneapolis, Minn., to hold till you want it; otherwise will instruct them to ship as soon as car arrives, and, if they do not hear from you, they will do so." June 30th plaintiffs sent a bill for the 4,000 lbs. twine with this notation: "In car load to Security W. H. Co. Terms, note due Nov. 1, '90, with 8% interest after due." June 13th defendant wrote the Security Warehouse: "Messrs. Hoover & Gamble, of Miamisburg, Ohio, are shipping twine to your house for me, and I want you to hold this twine until I order it out. It must be held free of charge to me; if there is any charge, you must make H. & G. stand it." July 9th defendant wrote plaintiff: "Your letter received, with note inclosed for signature. I will attend to it as soon as twine is received." Upon the telegram of June 25th plaintiff set apart from its stock 4,000 lbs. of twine, marked it with defendant's name addressed to him at Beardsley, sent it in a car load of other twine in various parcels tagged and addressed to various persons to the Security Warehouse Company, Minneapolis, where it was received prior to July 10th. July 15th the warehouse, with its contents, including the 4,000 lbs. of twine, was totally destroyed by fire.

Whether, upon the foregoing correspond-

ence, the twine was to be delivered by plaintiffs to defendant at Beardsley or at Minneapolis is immaterial. It is clear it was not intended the title should pass to defendant, so that he should become liable for the price, until a delivery at one place or the other. Merely setting the twine apart from plaintiffs' general stock, for the purpose of filling defendant's order, did not pass the title, nor shipping it to the Security Warehouse, nor the receipt of it by the warehouse company, for that company was the agent of the plaintiffs. And had that company either tendered delivery to him at Minneapolis, or shipped it to him from that place, prior to the time specified in his order, he would have been under no obligation to receive it. When one orders goods to be sent him, and thereby makes the vendor his agent to select and appropriate the specific articles to the contract, the latter must do it in the manner prescribed. Thus, where the order was to ship the article from a specified place to the vendee, a shipment from another place was held not an appropriation of the article to the contract, so that the title passed. *Jones v. Schneider*, 22 Minn. 279. Of course, the vendee, when authorizing the vendor to make the appropriation, may attach a condition as to time, as the defendant did in this case, as well as any other condition. The plaintiffs did not observe that condition. The defendant might waive compliance with the condition; might take such action as would make a constructive delivery, without actually receiving the twine from the warehouse company, as if he had consented that the company should thereafter hold it for him; and plaintiffs claim that he did so by his letter to the company of June 30th. When that letter is read in connection with the order, and plaintiffs' letter of June 28th, it would be doing violence to it to construe it to be a consent, as between plaintiffs and defendant, to waive the condition of the order as to time, and to have the warehouse company hold the twine thereafter on account of defendant instead of on account of plaintiffs. Had it been written without any suggestion of plaintiffs that might be claimed as its effect. But they, for their own convenience, had shipped the twine from Miamisburg, so that it would arrive at Minneapolis before the time when defendant would be ready to receive it according to his order, and, assuming that he might waive the matter of time and consent to its shipment to him from Minneapolis as soon as it arrived there, the plaintiffs wrote their letter of June 28th, requesting him, in case he did not so consent, to do just what he did,—to notify the warehouse company, the agent of plaintiffs, to hold it till he should want it. Neither party could have understood that notification to be a consent to receive the twine before the time when he would have received it had it been shipped as directed by the order. Order affirmed.

CRANE v. WILSON et al.

(63 N. W. 506.)

Supreme Court of Michigan. May 28, 1895.

Error to circuit court, Bay county; Andrew C. Maxwell, Judge.

Action by Hiram A. Crane against Fitzland L. Wilson and others, as the Wilson Hoop Company, for the contract price of goods sold. From a judgment for plaintiff, defendants bring error. Reversed.

L. E. Joslyn (H. H. Hatch, of counsel), for appellants. Pratt, Van Kleeck & Gilbert, for appellee.

LONG, J. Plaintiff and one Hart entered into a written contract with the defendants, as the Wilson Hoop Company, to "deliver in the boom limits of the Bay View Boom Company, below M. Haggerty's boom," one to three hundred thousand feet of elm logs, 12 inches in diameter and upwards. The logs were to be banked at a certain place mentioned in the contract. The contract provided that, in consideration of the faithful performance of the agreement, the Wilson Hoop Company was to pay to Hart & Crane \$6.50 per 1,000 feet, as follows: \$2.75 when the logs were delivered on the bank, and \$3.75 when the logs were delivered in the Bay View boom, rafted in good shape, as provided above. The contract provided, as to time of delivery, as follows: "The party of the first part further agrees to run said logs down the boom limits just as early as possible in the spring of 1891; if possible, before or ahead of the drive." The contract was assigned to the plaintiff in this suit. He claims to have delivered on the bank 111,118 feet of contract logs; that, after they were scaled, all were rafted that defendants furnished chain dogs for; that they were run to the Bay View boom, the greater part in 1891; that those not run remained in the jam the following winter, and were run the next season; that he had received \$2.75 per 1,000, according to the contract, for 111,118 feet; and that the balance of the contract price was still due. This action is brought to recover such balance. On the trial, de-

fendant contended that under the contract it was not bound to receive the logs delivered after the season of 1891; that the logs were for manufacture into hoops, and must be green timber; that the logs remaining over the season exposed to the sun were spoiled for hoops; and that the contract limited the time in which they were to be received to the season of 1891.

The court charged the jury that: "If the logs came down, and were delivered to the defendants, in the boom company limits below Haggerty's boom, either in the year 1891 or 1892, they would be bound to take them. * * * They would be bound to pay for them, whether they took them or not, if they were put down there for them." This raises the only question which we need discuss. The contract, in very plain terms, limits the time of delivery to the season of 1891. It is true that in an agreement which calls for delivery by a certain time, and delivery is not made by such time, a subsequent delivery will be binding, provided the party to whom the delivery is to be made accepts and retains the property, as such acceptance is a waiver of the terms of the contract, so far as the time is concerned, and is evidence of a new contract, fixing a different time; and it is true that the plaintiff claimed that the defendant did accept delivery at a time later than the time mentioned in the contract. But this was in dispute between the parties, as the defendant contended that it had not accepted them. The testimony was conflicting on this point. The court, however, explicitly instructed the jury that the defendants were bound to take them, even if not delivered until the year 1892. It was a question of fact, for the jury to determine, whether there was an acceptance of the logs of 1892. If there was no such acceptance, or waiver of the time of delivery, then, under the terms of the contract, the plaintiff could not insist upon the defendants taking the logs of 1892. The court was in error in the charge. The parties had reduced their contract to writing, and must be bound by its terms. The judgment must be reversed, and a new trial granted. The other justices concurred.

WHEELHOUSE v. PARL.

(6 N. E. 787, 141 Mass. 593.)

Supreme Judicial Court of Massachusetts.
Middlesex. May 8, 1886.

This was an action of contract to recover \$440.22 for a lot of leather sold to defendant. Hearing in the superior court, which found for the plaintiff, and the defendant appealed. The facts appear in the opinion.

F. W. Qua and F. P. Marble, for plaintiff.
Wm. H. Anderson, for defendant.

DEVENS, J. When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser; or when no agreement is made, or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods to the transportation of which, in a similar manner, the purchaser has not objected,—the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him subject to the vendor's right of stoppage in transitu. This proposition assumes that proper directions and information are given to the carrier as to forwarding the goods. *Whiting v. Farrand*, 1 Conn. 60; *Quimby v. Carr*, 7 Allen, 417; *Finn v. Clark*, 10 Allen, 484; *Finn v. Clark*, 12 Allen, 522; *Downer v. Thompson*, 2 Hill, 137; *Foster v. Rockwell*, 104 Mass. 170; *Odell v. Railroad*, 109 Mass. 50; *Wigton v. Bowley*, 130 Mass. 252.

The defendant had made a purchase of leather in November previously to the purchase of that the price of which is in controversy, under a direction to the plaintiff to "ship to care of D. and C. Melver, shipping merchants, Liverpool, as soon as possible, for their next steamer to Boston, direct." This shipment was made as ordered, and on December 16, 1884, the defendant sent a further order saying: "As regards the shipping of the leather just received, you have done everything satisfactory. Ship this order in like manner."

The directions by which the plaintiff was to be controlled must be interpreted as requiring him to forward the goods to D. & C. Melver, to be transported by them by the Cunard line, of which they were managers and agents. The words "their next steamer" could not have meant any steamer which would accept freight from D. & C. Melver. Cases may be readily imagined where these words would be of the highest importance;

as if the defendant had an open policy of insurance protecting his goods which might be sent by the Cunard line. It might also be true that the defendant would not deem a policy of insurance necessary when goods were sent by a well-established passenger line, where greater precautions might probably be taken for safety, which he would deem necessary when they were sent by a purely freighting steamer. The goods were actually forwarded to D. & C. Melver, with instructions in conformity with the directions of the defendant, and, had the matter ended there, so far as any directions to D. & C. Melver is concerned, the plaintiff would be entitled to treat them as delivered to the defendant, and to require him to pay the purchase money. If, on the other hand, while the goods were yet in the hands of the carrier, and before transportation of them had commenced, the plaintiff changed the directions given to him by the defendant, or authorized the carrier to transport them in a different mode from that directed by the defendant, and loss has thereby occurred, he cannot contend that they were delivered to the defendant by him. By continuing to exercise dominion over them, and by giving a new direction, impliedly withdrawing the directions previously given, he cannot be allowed to assert that he had made a complete delivery by his original act, if a loss has occurred by reason of that which he has subsequently done or directed. The change in the directions given relates back to and qualifies the original delivery.

The plaintiff, in answer to a letter from D. & C. Melver, after the goods had reached them, inquiring whether they were to keep the goods "for our steamer, 14th inst., or ship by the Glamorgan," ordered them to be shipped by the steamer arriving out first, presumably the steamer which D. & C. Melver believed would be the first to arrive. The Glamorgan was not a steamer of any line of which D. & C. Melver were owners or agents, and in no way answers the description of "their steamer" as applied to D. & C. Melver. By neglecting to limit the authority of D. & C. Melver to send by a steamer which could be thus described, and by directing them to send by the steamer which would first arrive, the plaintiff had failed to comply with the orders of the defendant as to the shipment of goods; and if correct directions had originally been given, had withdrawn them, and substituted others. When, therefore, exercising the authority thus given by the plaintiff, D. & C. Melver send by the Glamorgan, as being, in their judgment, the steamer likely to arrive first, and a loss occurs, it should not be borne by the defendant, whose directions have not been followed. Judgment for the defendant.

COMSTOCK et al. v. SANGER et al.

(16 N. W. 872, 51 Mich. 497.)

Supreme Court of Michigan. Oct. 17, 1883.

Keating & Dickerman and Markham & Noves, for appellants. Norris & Uhl, for appellee.

COOLEY, J. Assumpsit to recover the price of lumber sold. On August 26, 1881, Mr. Chauncy Pettibone, as agent for the defendants, entered into a contract with the plaintiffs, of which they gave him the memorandum copied in the margin.¹ The plaintiffs commenced making delivery on the contract, and prior to October 4, 1881, had delivered upwards of 400,000 feet of lumber in Milwaukee; and sufficient in Muskegon to make up a total of 759,623 feet. Mr. Pettibone had attended to the receipt of the lumber at Muskegon, and tally sheets had been given, showing the quantity of the several sizes. It will appear that only a fraction over 40,000 feet was then required to make up 800,000 when, on the day last named, a vessel, the R. P. Mason, was waiting at Muskegon to be loaded. But though the whole quantity was so nearly supplied, it is shown that of the special sizes mentioned in the contract much more than 40,000 feet had not been delivered. These sizes were of more value than the ordinary run of the lumber, and were not always readily obtainable, and much lumber of unusual sizes, but not corresponding to the sizes specified in the contract, appear to have been delivered from time to time, without objection by either party, and without any expressed understanding respecting them.

When the R. P. Mason commenced to load,

¹ Muskegon, August 26, 1881.

Messrs. Sanger, Rockwell & Co., Milwaukee, Wis.—Gentlemen: Sold you to-day two cargoes of lumber, of about 400,000 feet each, into which we will put 100 pes. 8x8-14; 50 pes. 8x8-16; 40 pes. 8x10-18; 30 pes. 8x10-16; 40 pes. 8x10-18; 20 pes. 10x10-12; 40 pes. 10x10-14; 60 pes. 10x10-16; 40 pes. 10x10-18; 30 pes. 10x10-20; 30 pes. 10x10-22; 20 pes. 12x12-12; 20 pes. 12x12-14; 10 pes. 12x12-16; 20 pes. 12x12-18; 30 pes. 12x12-20; 30 pes. 12x12-22; 200 pes. 2x12-18; 500 pes. 2x12-22; 500 pes. 2x12-24; 200 pes. 2x12-26; 400 pes. 2x6-22; 400 pes. 2x16-26; 200 pes. 2x16-28; 10 pes. 10x12-12; 10 pes. 10x12-14; 10 pes. 10x12-16; 10 pes. 10x12-18; 40 pes. 10x12-20; 40 pes. 10x12-22; 3,500 pes. 2x4-18; 1,000 pes. 2x4-20. Should we be unable to furnish the amount of 2x12-24 named, we will furnish you same amount cut to other sizes as you may wish. Will ship one cargo within 10 days, and the second within 30 days. Lumber to be sound merchantable lumber, excluding lengths under 10 feet. Lumber to be inspected and tallied by W. McCullum. The price of first cargo to be \$11, delivered to you in Milwaukee, and of the second \$9.50, on dock here. Terms of sale, cash. Provided we are unable to furnish the exact number of pieces of lengths above 20, no damage shall accrue, but in any event we will furnish 75 per cent. of each kind named.

D. F. Comstock & Co.

We are to pay one-half tally on this lot.

Pettibone.

then, the situation was this: The whole quantity was delivered, with the exception of about 40,000 feet, and the delivery of special sizes was so far short that if the whole 40,000 should be of those sizes there would still be a large deficiency. It might be expected, therefore, that if defendants proposed to insist upon literal compliance with the contract, they would then decline to receive any lumber not of the special sizes. So far were they from doing this, that the R. P. Mason was loaded with lumber as it was convenient to take it from piles on the dock, and the load swelled the total receipts to 934,557 feet. This was done under the supervision of Pettibone, who appears to have endeavored to obtain what he could of the special sizes, but made no protest against receiving other lumber. The quantity of the special sizes then deficient was about 135,000 feet, according to Pettibone's estimate. When the vessel was loaded, Pettibone called the attention of the plaintiffs to the fact that the quantity taken largely exceeded that which defendants had bargained for, and he claimed that for the excess over 800,000 feet the defendants ought not to pay the contract price. Plaintiffs, according to their evidence, then agreed with him that the price for this excess should be nine dollars a thousand feet, while, according to his evidence, plaintiffs proposed to take nine dollars, and he made no response. Pettibone's evidence on the subject is as follows:

"The captain fixed the loading himself. After the loading of the R. P. Mason on one of the docks,—I can't say whether it was before or after I received the tally sheets; I should say it was before,—I stated to Mr. Comstock, in substance, that if, in order to get in the amount of those special sizes that he had contracted to furnish us, there was evidently a good deal of other length that got in, that would swell the total to a great deal more than the 800,000 feet, and that we did not want them at the same price; that piece stuff was lower. Comstock admitted the fact that there would be more than 800,000 in order to secure the special sizes that we wished, and said that he would allow us half a dollar. That was his offer. I made no reply to that. I did not accept his proposition. I wouldn't swear that at that particular time it was spoken of about his furnishing the balance of the piece stuff named in the contract."

Plaintiffs claim that performance on their part was completed when the R. P. Mason was loaded, and that they were entitled to the contract prices for 800,000 feet, and nine dollars a thousand for the excess, under their agreement with Pettibone. Defendants denied that they had agreed with Pettibone upon the price for the excess, but insisted upon their right to receive the 135,000 feet of special sizes which were deficient. Evidence was put in of attempts by plaintiffs to obtain payment of the balance due them, according to their claims, and by defendants to secure the special sizes of lumber; all of which proved

ineffectual. It was shown that plaintiffs made some effort afterwards to procure the special sizes for defendants, without avail; but whether this was in recognition of a right in defendants to receive them, but merely to avoid litigation, was made a question. The circuit judge submitted the evidence on this subject to the jury, expressing his own opinion, however, that neither party was shown to have done anything after the R. P. Mason loaded which would constitute a waiver of rights. At the request of the plaintiff he gave the following instructions:

"If the jury find that when the R. P. Mason was loaded it was discovered that her load, with what had before that been received by the defendants, exceeded the 800,000 feet mentioned in the contract by 135,536 feet, as per the tally sheets, and that thereupon the agent of the defendants, Mr. Pettibone, objected to paying the contract price of \$9.50 upon such excess, as it exceeded the amount contemplated by the contract, and it was then and there agreed between the said Pettibone and plaintiff Chester W. Comstock, as a compromise and adjustment touching the lumber received and agreed to be received under the contract, that such excess of 135,536 feet should be charged at nine dollars per thousand only, then, although the entire amount of 935,536 feet actually received by the defendants, and by them appropriated to their own use, was cut, in every respect, sawed into the particular lengths and sizes specified in the contract, the defendants will not be allowed to recoup by reason thereof, but will be held to pay for the lumber so received and retained by them."

"The contract provided that out of the 800,000 feet contracted to be sold a certain portion should be cut into certain specified sizes and lengths, and it was the privilege of the defendants to insist upon strict compliance therewith or to waive the same. It was their privilege, as the lumber was delivered to them from time to time on the dock, to refuse to receive any portion that did not satisfy the contract; and if, with every opportunity afforded to inspect the same, and if, when the last cargo was loaded, they had full knowledge that the entire quantity contemplated by the contract would be thereby received, and that there was an excess of certain sizes and lengths, and a shortage as to other sizes and lengths, and they saw fit to accept the same in satisfaction of the contract, they cannot recover on account of such shortage."

It is contended on the part of the defense that there was no evidence in the case which warranted submitting to the jury the question of compromise as the judge submitted it, and no evidence showing any waiver by defendants of their right to the remainder of the special sizes. We think there not only was such evidence, but that it was so conclusive in its nature that but one deduction could be made from it.

It is true that in the talk between Pettibone and the plaintiffs after the loading of the R.

P. Mason, the word "compromise," or perhaps any equivalent word, is not shown to have been made use of, but what they were speaking of is seen to have been a delivered surplus above the contract quantity, and it is only in respect to this that there is any allusion to an open question. The 800,000 feet had been delivered and received; it did not in all respects comply with the contract, but it had nevertheless been taken without, so far as appears, any protest or any reservation of a right to question afterwards its having been received under the contract. A large excess had also been received, and Pettibone claimed that this had happened because they would not otherwise get the special sizes the contract called for. For this reason, and also because, as he said, there had been a decline in prices, he insisted there should be an abatement. But it does not appear that any excess was in the mind of either party except the existing excess over 800,000 feet, nor did Pettibone at the time put forward a claim to the special sizes not yet delivered. If those special sizes were still to be received, the existing large excess would be doubled, and there would be the same reason for making a deduction for the added excess as for that already had. But nothing said by either party at this time gives any indication that either of them had in mind any increase to take place afterwards in the existing excess.

It appears, then, that the full contract quantity had been delivered by plaintiffs, and been received by defendants under the supervision of defendants; and though the special sizes did not correspond to those specified in the contract, there had been no protest against the receipt, and no reservation of a right to object afterwards to any of it. When the final load was taken, defendants, by their agent, did complain that an excess had been thrown upon them in consequence of the practical difficulty in reaching the special sizes in any other way; and, in respect to this excess, an abatement in price was insisted upon as reasonable. No further claim was then made, and, so far as the evidence goes, there was nothing to then apprise the plaintiffs that defendants disputed having received any part of the 800,000 feet of lumber under the contract.

But even if defendants had then insisted, at that time, upon a right to further delivery of special sizes of lumber, we see no ground on which they could have been entitled to it. They had already received the full quantity, and any difference between what they had a right to demand and what they had actually received was waived by the reception without protest. This is a rule of justice as well as law. *Parker v. Palmer*, 4 Barn. & Ald. 387; *Chapman v. Morton*, 11 Mees. & W. 534; *Reed v. Randall*, 29 N. Y. 258; *Manufacturing Co. v. Allen*, 53 N. Y. 515; *Barton v. Kane*, 17 Wis. 37; 18 Wis. 264; *Watkins v. Paine*, 57 Ga. 50. The contract in law had been complied with; and, though the performance was not exact, it had been accepted. If the

jury had found otherwise, it would have been the duty of the court to set aside their verdict as unwarranted. As to the excess over \$800,000 feet, it is of no importance in this case whether Pettibone did or did not agree to the price the plaintiffs named, as it appears with-

out dispute the lumber was worth that price; and, in the absence of any agreement upon the price, the value must govern. This view of the case disposes of it, and the judgment must be affirmed, with costs.

The other justices concurred.

PALMER v. BANFIELD.

(56 N. W. 1090, 86 Wis. 441.)

Supreme Court of Wisconsin. Nov. 28, 1893.

Appeal from circuit court, Grant county; George Clementson, Judge.

Action by John Palmer, Jr., against Thomas Banfield. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

This action is to recover the price of a reaper and harvester alleged to have been sold and delivered by plaintiff to defendant in August, 1892, for the agreed price of \$110. The complaint states the contract to have been that defendant should on demand give plaintiff for the price of the machine his two promissory notes for \$55 each,—one payable in one year, and the other in two years, from the date of sale, with interest. It is further alleged in the complaint that defendant took, used, and accepted the machine, and that on due demand by plaintiff, made before the action was commenced, that defendant execute such notes, the latter refused to do so. In his answer defendant denies that the parties made the agreement alleged in the complaint, and avers that the only agreement made in respect to the machine (which is referred to in the answer as a harvester and binder) was as follows: "The defendant was to take and did take said binder to try and use in his harvesting for the years 1892 and 1893, and that, if said harvester and binder did the work satisfactorily to this defendant during said two harvests, then, in that event, said defendant was to pay said plaintiff the sum of \$55 after the harvest of 1893, and the further sum of \$55 in the fall of 1894, and not otherwise." The answer further alleges that on a fair trial of the machine it failed to work satisfactorily to defendant, and failed to do good work, whereupon he immediately returned it to plaintiff. The answer also contains a counterclaim for \$25 damages for "trouble and expense by reason of said harvester and binder failing to work satisfactorily to the defendant." The cause was tried before the court and jury. The testimony of plaintiff tends to prove the allegations of the complaint, and that of defendant tends to prove the allegations of the answer. It appears by the testimony that the machine was delivered to defendant on a certain Thursday afternoon, and was immediately put to work, and developed some defects in its construction. That defendant used it through Friday, and discovered other defects going to the capacity of the machine and the principle upon which it was constructed. The testimony tends strongly to show, if it does not prove conclusively, that as early as Friday defendant had discovered all the defects in the machine, was dissatisfied with it, and had decided to return it. However, he used the machine nearly all day on Saturday, and until he had finished cutting his grain, and

then sent it to Cuba City, 1½ miles distant, where plaintiff had a place of business, and it was left on a vacant lot formerly occupied by plaintiff. The plaintiff never accepted return of the machine, and has had nothing to do with it since such attempt to return it.

The court refused to give the following instructions proposed on behalf of defendant: "(1) When machinery is guaranteed to do certain work in a satisfactory manner, and not to be paid for until satisfactory to the purchaser, if it is in good faith unsatisfactory to him, and he notifies the vendor of that fact within a reasonable time, there is no sale. (2) If you find that the contract was that the binder was to do work to the satisfaction of the defendant, and that the defendant made an honest effort to make said binder do good work, and if the defendant within a reasonable time returned the binder to plaintiff because he was in good faith dissatisfied with the binder, then your verdict shall be in favor of the defendant. (3) If the jury find in favor of the defendant, they may also find such damages, if any, that he may have suffered by reason of the failure of the binder to do the work agreed that it would do by the contract." The court submitted it to the jury to find what the contract of the parties was, and instructed the jury substantially that, if they found it to be as alleged by the plaintiff, there was an implied warranty that the machine was suitable for the work it was intended to do; and, if not suitable therefor, defendant had the right to return it to plaintiff within reasonable time after discovering its defects. But the court further instructed the jury, if they found that defendant, after "he knew or ought to have known from the test he made that this machine was an unsatisfactory machine on Thursday or Friday, and, after determining that he was not satisfied with it, nevertheless went on and worked with it on Saturday, for the purpose of completing his harvest, the law would consider that an acceptance of the machine." Also that such acceptance would foreclose defendant's right to return it, and render him liable to pay therefor the agreed price. The court further instructed the jury that, if they found defendant's version of the contract the correct one, he had the right to return the machine if not satisfied with it, unless he had theretofore accepted it under the rule of acceptance above stated; and, if he did thus accept it, the right to return it was lost. The jury found for plaintiff, and assessed his damages at \$110 (that being the admitted contract price of the machine) and interest thereon from the commencement of the action. A motion by defendant for a new trial was denied, and judgment entered for plaintiff pursuant to the verdict. Defendant appeals from the judgment.

T. L. Cleary, for appellant. Carter & Burns, for respondent.

LYON, C. J., (after stating the facts.) I. There is no claim in this case for damages for a breach of warranty, either express or implied, on the sale of the reaper and harvester in controversy. The question of warranty is, therefore, of no significance in the case, except as it bears upon the right of defendant to return the machine in case the sale thereof was absolute, as claimed by plaintiff. If the jury found the contract to be as claimed by defendant, under the charge of the court the question of warranty does not necessarily arise, for the jury were instructed that, if they so found, the defendant had the right to return the machine if not satisfied with it, although it may have done such work as would satisfy men generally. The right, under such a contract, to return the property, may be stated a little too broadly in the instructions; but no exception was taken thereto, and it stands as the law of this case. Certainly the rule thus stated allowed the defendant to be dissatisfied with and to return the machine, even though there was no breach of any warranty in respect thereto, either express or implied. Neither is there any controverted question of reasonable time in which to return the machine involved in the case. If the defendant did not, by his use of the machine, destroy the right to return it, if otherwise he had such right, it must be held as matter of law that he returned it, or rather that he effectually offered to return it, (which amounts to the same thing,) within a reasonable time after it came to his possession. So the question is not whether the offer to return was made within a reasonable time, but whether the defendant had any right to return the machine when he attempted to do so. If the sale was absolute, as claimed by plaintiff, and there was a breach of an express or implied warranty of the machine, and if defendant accepted the machine after testing it, and discovering its defects; or if the sale was upon condition that, if dissatisfied with the machine, the defendant might return it, and if defendant, after testing it, fully determined that it was unsatisfactory to him, and he would return it, and afterwards accepted it,—in either case the right to return it was lost. The court instructed the jury that, if defendant ascertained on Thursday or Friday that the machine did not do good work, in the one case; or, in the other case, that he then determined he would return it as unsatisfactory,—if he used it on Saturday, not to test it further, but merely to complete the cutting of his grain, and without any expectation that plaintiff or his agent would come there and make the machine satisfactory to him, such use was an acceptance of the machine as a compliance with the contract, and was fatal to his right to return it. We think the court stated the law correctly, and that the testimony justified the submission to the jury of the ques-

tion of acceptance. It should be stated that when plaintiff took the machine to defendant he had with him an expert, who assisted in starting it. There is testimony to the effect that, without plaintiff's knowledge, such expert told defendant's son he would return on Friday, and see how the machine worked; but he made no promise to go there on Saturday. Plaintiff informed defendant that he would remain at Cuba City (his home being in Galena) until Saturday, where he could be notified if the machine did not work right. He remained there until Saturday afternoon, but received no such notice. It is very doubtful whether the expert had authority to bind plaintiff by his promise to return on Friday, the plaintiff being present, acting for himself, although not in hearing at the time. But, waiving that question, the jury might well find from the testimony that defendant had no right to expect, and did not expect, that either plaintiff or the expert would return to defendant's farm on Friday, or at any other time, or that either of them intended or promised to have anything further to do with the machine, unless notified that it did not work well.

II. It results from what is said above that the first and second instructions proposed by defendant are defective, in that they ignore the question of acceptance. They should have been qualified by adding to each a clause to the effect that, if defendant accepted the machine in the manner above stated,—that is, by using it to finish his harvest after he had tested it, and found that it would not do good work, or he determined that it was unsatisfactory and he would return it,—his right to return it was lost; and the question whether he did so return or offer to return it, or notify plaintiff of his dissatisfaction therewith, within a reasonable time, would be thereby eliminated from the case. The third proposed instruction goes expressly upon the hypothesis that the defendant obtain a verdict. The verdict being for plaintiff, the instruction becomes inapplicable to the case.

III. On the trial the question was raised whether plaintiff owned the cause of action for the price of the machine. It was proved that he was the agent of the manufacturers for the sale thereof, and other like machines, under a contract prescribing the terms on which alone sales should be made by him, and providing that, if sales were made on other terms, plaintiff should be charged with the machines thus sold as a purchaser. The sale of the machine in question was not made in accordance with such prescribed terms and before this action was commenced it was charged to the plaintiff as a purchaser, and he paid the manufacturer therefor. Of course, he thus became the owner of the cause of action for the price of the machine.

IV. Among the several errors assigned, one is as follows: "The court erred in conveying

to the said jury his opinions on the merits of the case by the manner in which he commented on the case and formulated his instructions to the jury." The learned counsel for defendant stated in his argument that this is the main error on which he relies for a reversal of the judgment, and he explained in a very interesting manner how an honest judge may be unconsciously betrayed into actions and expressions in the presence of the jury very prejudicial to the cause of one or the other of the parties. And so, while paying a high and well-deserved tribute to the integrity, ability, and desire to do exact justice in all cases of the judge who presided at the trial, he argued that this is a case of unconscious bias on the part of

the judge against the case of the defendant, and sought to prove its existence from the record. It is almost, if not entirely, inevitable that he should fail. This court can only know from the record what the judge said and did on the trial. It is sufficient to say that the most searching scrutiny of the record not only fails to disclose the existence of any such bias, but it fails to raise even a suspicion of its existence. We find neither error nor impropriety in any of the remarks of the judge on the trial, which are referred to by counsel in support of his position. Neither do we find any error in the rulings of the court on the trial, or in the charge to the jury. The judgment of the circuit court must be affirmed.

PRATT v. PECK et al.

(36 N. W. 410, 70 Wis. 620.)

Supreme Court of Wisconsin. Jan. 31, 1888.

Appeal from circuit court, Outagamie county.

George W. Pratt sued Oscar D. Peck and others upon a contract for the manufacture and sale of lumber. Plaintiff obtained judgment, and defendants appeal.

Weisbrod, Harshaw & Nevitt and S. C. Pinney, for appellants. Gabe Bonck, for respondent.

ORTON, J. The plaintiff was a manufacturer of lumber in the city of Oshkosh, and the defendants were manufacturers of sash, doors, and blinds, on the opposite side of the street. About the ninth day of August, 1883, the defendants bought of the plaintiff 600,000 feet of plank, partly seasoned and then piled up in the plaintiff's mill-yard, and 400,000 feet of the same kind of lumber, to be sawed and to be piled up in the plaintiff's yard, in the same manner, but in another place nearer the defendant's factory. The terms of the bargain were that the defendants should pay for said lumber at the rate of \$14 per thousand for shop common, \$24 per thousand for third clear, and \$34 per thousand for first and second clear. For the 600,000 feet then piled up, the defendants were to pay the plaintiff in 10 days, and for the 400,000 feet, to be sawed and so piled up, in 90 days, and if the plaintiff should wish to use the defendants' paper for the 400,000 feet, before it was due, that he should have it, and the interest thereon should be charged back up to the time it was due. The 600,000 feet was to be hauled at once to the defendants' yard by the plaintiff, and the 400,000 feet was to be piled up loosely, so that it could dry, and was not to be hauled by the plaintiff until the next spring. Both parties agree that this was the contract. The plaintiff commenced hauling the dry lumber at once, and continued to haul until October 14th following, when the defendants' factory was burned, and had hauled 334,000 feet, and afterwards, by the direction of the defendants, 143,000 feet was hauled to Gould's mill, in Oshkosh, and the balance was burned up in the plaintiff's yard. The defendants paid the plaintiff, by September 1st, \$10,000, and afterwards the balance was paid for the dry lumber. The 400,000 feet was sawed and piled up in the place so designated in the plaintiff's yard, and near the defendants' office, and marked with the defendants' initials, by October 1st, and notice thereof was given to the defendants. At the time of the purchase, the piles of dry lumber were estimated and marked, and afterwards exactly measured when hauled. On the fifteenth day of November, the plaintiff's mill was burned, and the largest part of the 400,000 feet. The plaintiff testified, and the jury were authorized to find, that the defendants were fre-

quently on the piles of the green lumber while it was being sawed, and knew the kinds and quality of the lumber, and that after the greater part of the green lumber was so burned, the defendants tried to have the plaintiff let them off from the purchase of it, and on his refusal to do so, they authorized him to sell the remnant for them at the best rate he could get, and he did so sell it, and credited the defendants with what he received therefor.

This action is brought to recover the balance due for the 100,000 feet. The defense is, that which is not uncommon in such cases where the property has been burned, that at the time of the burning, the 400,000 feet, or any part of it, had not been delivered to the defendants, or accepted by them. The case has been twice tried, and judgment rendered for the plaintiff. The evidence on both trials was substantially the same. From the first judgment an appeal was taken to this court and the judgment reversed, on the score ground that the jury failed to find, upon the only material issue, whether the 400,000 feet had been delivered or accepted before the fire. 65 Wis. 463, 27 N. W. 180. On the last trial, the jury found, in answer to the ninth question, that "there was a delivery of this 400,000 feet of lumber tendered by the plaintiff to the defendants about October 1, 1883;" and to the tenth question, that "the defendants accepted the delivery of that lumber;" and to the eleventh question, that "it was the intention of both parties, and the agreement between them, that the title to this 400,000 feet of green lumber shall pass to the defendants upon the lumber being piled and marked by the plaintiff, and notice thereof given to the defendants." These findings fully supply the defects of the former verdict, and answer the requirements of the former decision. The two trials of this case, and the arguments upon the law upon both appeals, have been most ably conducted by the very ablest lawyers on both sides, and the case is both important and interesting. But we cannot but think that the grounds of the controversy have been somewhat magnified, and the questions are very technical. The law is so well settled in this class of cases as to be almost, if not quite, elementary. In such a case there is no need of stumbling upon the technical terms "delivery and acceptance." No question is made of the kinds, quality, or amount of the lumber so piled up in the plaintiff's yard, and there could not well be any question of that kind, for the plaintiff proved that the lumber, in all respects, was according to the contract. It is important to know what the contract was, and how the parties evidently understood it to be. It cannot be that this lumber was to remain the property of the plaintiff until it was hauled to the defendants' factory, for the whole consideration was to be paid within 90 days from the time the lumber should be sawed and piled up in

the place designated, and the hauling was not to be done until the next spring. In the mean time the lumber was drying in the plaintiff's yard, for the sole benefit of the defendants. If the 90-days credit was to commence from the piling of the lumber on the place where the defendants wished it to be piled, then it follows that then was the time the defendants were to own the lumber. It is a close question whether the 90 days did not commence at the time of the purchase, the same as the 10 days for the dry lumber. But giving the defendants the benefit of having the 90 days commence at the time the green lumber is piled up according to the contract, it certainly could not be later than that. This is a contract as well as a sale. The plaintiff performed it to the fullest extent possible on his part when he piled the lumber in the place designated, and marked it, and notified the defendants thereof. But it is said that the lumber had not been inspected to ascertain the quality and quantity. Whose fault was it that it was not inspected? The plaintiff could not compel the defendants to inspect it, or to come and expressly accept it. Could they delay or refuse to inspect it, and thereby postpone the payment, or, by such delay or refusal, postpone or destroy the obligation to pay for it? Most certainly not. The lumber was to remain in the yard of the plaintiff, piled loosely so as to dry, and remain there from October 1st until the next spring, for the mere accommodation of the defendants. It was drying for their benefit. Suppose there had been no burning, and after the defendants were notified that the lumber was ready for them, piled and marked, and the defendants had delayed to expressly accept it, or to pay any attention to it, at the expiration of the 90 days after that, is there any doubt that the plaintiff could have sued the defendants for the money and have recovered? So he may recover now. The burning could make no difference in the liability, if it did in the disposition, of the defendants to pay for it according to the contract. The defendants placed this practical construction upon the contract (which is entire) when they estimated the dry lumber in the pile, and paid for it accordingly. Then, as a matter of mere contract, without reference to the technical questions of delivery and acceptance, the plaintiff had fully performed his part of the contract, and was therefore entitled to the consideration agreed to be paid by the defendants. In such a very clear case we shall not place much stress upon the mere technical question whether the lumber was actually delivered by the plaintiff, or accepted by the defendants, as in other cases not applicable. On the merits of the case, we are not asked to disturb the verdict, but certain errors of the trial court are alleged, which, the learned counsel of the appellants

claim, affected the merits of the case or misdirected the jury.

We have carefully examined the exceptions, and we cannot find that any of them were material to the merits and real justice of the case, except, perhaps, that one relating to the charge of the court, as to the effect of the notice to the defendants that the lumber was ready for them, piled and marked, and the legal effect of the defendants' delay in expressly accepting or rejecting the same, for an unreasonable time. That instruction was as follows: "If the lumber was piled, and notice thereof given to the defendants, and the defendants did not, within a reasonable time after notice, notify the plaintiff of their refusal to accept a delivery, an acceptance or delivery may be presumed or inferred by the jury, from the failure of the defendants to give notice of their refusal, and ought to be so inferred, and in that case your answer to question No. 10 should be 'Yes.'" This "silence and delay" may be found in some other parts of the charge excepted to. To show that this instruction is erroneous, the learned counsel of the appellants cite the language of Mr. Benjamin, in his work on Sales, as follows: "The fair deduction from the authorities seems to be that this is a question of degree; that a long and unreasonable delay would afford stringent proof of acceptance, while a shorter delay would merely constitute some evidence to be taken into consideration with the other circumstances of the case." It would seem that this authority sanctioned the instruction. "Unreasonable delay," and refusal to accept "within a reasonable time," would seem to be substantially alike. Beyond a reasonable time is unreasonable delay. If the delay is not reasonable, it is unreasonable. The delay is "stringent proof of acceptance." This text is sustained by the cases cited by counsel. In application to the facts of this case, we think the instruction was strictly correct. This instruction is directly approved by the decision in the case of *Mason v. Whitbeck Co.*, 35 Wis. 167, and many other cases in this and other courts. The learned counsel of the respondents cites many cases to the same effect, to which reference may be had. But this case is too plain to burden this opinion by the citation of many authorities, and it has already occupied much space in the reports. The fires which burned the defendants' factory and the plaintiff's mill and much of this lumber were most unfortunate, and the case is a hard one for the defendants; but it must be a hard one to one of the parties in any event; but this should not press the courts into the establishment of unsound legal principles.

We find no error in the record which ought to reverse the judgment. The judgment of the circuit court is affirmed.

DYER et al. v. GREAT NORTHERN RY. CO.

(53 N. W. 714, 51 Minn. 345.)

Supreme Court of Minnesota. Nov. 21, 1892.

Appeal from municipal court of St. Paul; Twohy, Judge.

Action by W. J. Dyer and others, copartners as W. J. Dyer & Bros., against the Great Northern Railway Company, to recover the value of a piano shipped by them over defendant's road. The cause was submitted for decision to the court upon a stipulation of facts, which are set out in the opinion. Judgment was ordered for plaintiffs. From an order denying a new trial, defendant appeals. Reversed.

M. D. Grover and R. A. Wilkinson, for appellants. M. C. Laughlin and Mr. Morrison, for respondents.

COLLINS, J. Plaintiffs were the consignors, one Colwell the consignee, and defendant the common carrier, of a piano shipped from Minneapolis to Anoka over its line of railway. When the instrument was delivered to defendant for carriage its agent gave the usual bill of lading to plaintiffs, and this was immediately transmitted by them to Colwell, the consignee. Soon after its arrival at Anoka, and before Colwell had the opportunity to remove it from the depot, the piano was destroyed by fire. Thereupon Colwell made a claim upon defendant for its value, producing the bill of lading and an invoice, from which it appeared that he had purchased the piano from plaintiffs, and had partly paid for the same. The fact was that the sale to Colwell was conditional, a written contract having been made that the title to the instrument should remain in plaintiffs until Colwell paid for it in full, and a copy of this contract had been duly filed in the office of the proper city clerk a few days before the fire, in compliance with the provisions of the statute. Gen. St. 1878, c. 39, §§ 15, etc. Defendant had no actual knowledge

of this, and had not been advised in any manner as to plaintiffs' claim upon the piano, when, in settlement of Colwell's demand, it paid to him its full value. It is thoroughly settled that if no other facts appear the consignee, and not the consignor, of property delivered to a common carrier must be considered its owner. *Benjamin v. Levy*, 39 Minn. 11, 38 N. W. 792. The legal presumption is that, upon the delivery of goods to a common carrier, the title thereto vests in the consignee, and this presumption the carrier has a right to rely upon, in the absence of express notice from the consignor to the contrary. The carrier, therefore, has the right to settle with the consignee in case the property is lost, stolen, or destroyed. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 Pac. 284; *Pennsylvania Co. v. Holderman*, 63 Ind. 18; 2 Am. & Eng. Enc. Law, pp. 810, 811, and cases cited in notes. Again, upon the stipulated facts, Colwell had a special property in the instrument, and as a special owner could recover its full value from the defendant. *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114. See, also, *Jellott v. Railway Co.*, 30 Minn. 265, 15 N. W. 237; *Brown v. Shaw*, 51 Minn. 265, 53 N. W. 633; *Marsden v. Cornell*, 62 N. Y. 215; *Boston & M. R. Co. v. Warrior Mower Co.*, 76 Me. 269; *White v. Webb*, 15 Conn. 345. Counsel for respondents do not take issue upon these propositions, but insist that, on the filing of a copy of the conditional contract of sale, as before stated, defendant carrier had notice that their clients retained title to the property, and was bound by such notice. The statute (sections 15, etc., *supra*), have no application. They were enacted for the benefit and protection of the parties therein mentioned, namely, creditors of the vendee, subsequent purchasers, and mortgagees in good faith, and the well-established rules of law fixing defendant's liability as a common carrier were in no manner affected by the provisions therein contained.

Order reversed.

NATIONAL BANK OF COMMERCE OF
BOSTON v. MERCHANTS' NAT.
BANK OF MEMPHIS.

91 U. S. 92.)

Supreme Court of the United States. Oct., 1875.

Error to the circuit court of the United States for the district of Massachusetts.

H. W. Paine and H. C. Hutchins, for plaintiff in error. W. G. Russell, contra.

Mr. Justice STRONG delivered the opinion of the court.

The fundamental question in this case is, whether a bill of lading of merchandise deliverable to order, when attached to a time draft and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance for the payment. It is true, there are other questions growing out of portions of the evidence, as well as one of the findings of the jury; but they are questions of secondary importance. The bills of exchange were drawn by cotton-brokers residing in Memphis, Tenn., on Green & Travis, merchants, residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis; and bills of lading were taken by the shippers, marked in case of two of the shipments "To order," and in case of the third shipment marked "For Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawees that the bill of lading should be surrendered on acceptance of the bills of exchange; but the existence of this agreement was not known by the Bank of Memphis when that bank discounted the drafts, and took with them the bills of lading indorsed by the shippers. We do not propose to inquire now whether the agreement, under these circumstances, ought to have any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their indorsement and delivery pass the title of the shippers to the property specified in them, and therefore that the plaintiffs, when they discounted the drafts and took the indorsed railroad receipts or bills of lading, became the owners of the cotton, it is still true that they sent the bills with the drafts to their correspondents in New York, the Metropolitan Bank, with no instructions to hold them after acceptance; and the Metropolitan Bank transmitted them to the defendants in Boston, with no other instruction than that the bills were sent "for collection." What, then, was the duty of the defendants? Obviously, it was first to obtain the acceptance of the bills of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporaneous-

ly with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs, and their agents the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them, therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time bill, without further instructions, would not be justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

But it seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. This would not be doubted, if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case, it is clear that the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit, and is denied possession until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor; and such is the well-recognized doctrine of the law. The reason for this is, that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred

payment of the price. Hence it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale, it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But, if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been intrusted cannot reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date.

If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is, that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will, at a future day, deliver the goods to reimburse the advances; he is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance; it is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading cannot be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him. The same remarks are applicable to the case of an implication that the merchandise was shipped to be sold on account of the shipper.

Nor can it make any difference that the draft with the bill of lading has been sent to an agent (as in this case) "for collection." That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency. *Sweeny v. Easter*, 1 Wall. 163. It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a

promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent, he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading; and the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender; and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged. *Mason v. Hunt*, 1 Dougl. 237.

The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? Or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer, as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.) Meanwhile, though it be a twelve-month, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles,—such as peaches, fish, butter, eggs, &c.,—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

That the holder of a bill of lading, who has become such by indorsement and by discounting the draft drawn against the con-

signed property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferable by indorsement, are only quasi negotiable. 1 Pars. Shipp. 192; *Blanchard v. Page*, 8 Gray, 297a. The indorser does not acquire a right to change the agreement between the shipper and his vendee. He cannot impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But, were this not so in the case we have now in hand, the agents for collection of the drafts were not informed, either by the drafts themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do not, therefore, perceive any force in the argument pressed upon us, that the Bank of Memphis was the purchaser of the drafts drawn upon Green & Travis, and the holder of the bills of lading by indorsement of the shippers.

It is urged that the bills of lading were contracts collateral to the bills of exchange which the bank discounted, and that, when transferred, they became a security for the principal obligation; namely, the contract evidenced by the bills of exchange,—for the whole contract, and not a part of it; and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved; to wit, that the transfer of the bills of lading were made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments, unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton, and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and that thus the bank would obtain additional promisors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen, that whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for ad-

vancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept; and that, if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and indorsers, leaving the bank only a resort to the cotton pledged.

It is said, that, if the plaintiffs were not entitled to retain the bills of lading as a security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawees, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true; though they did know that the acceptors had previously promptly met their acceptances, which were numerous, and large in amount. But, if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not to deliver the cotton until the drafts were paid. Such instructions are not infrequently given in case of time drafts against consignments; and the fact that they are given tends to show that in the commercial community it is understood, that, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment.

Thus far, we have considered the question without reference to any other authority than that of reason. In addition to this, we think the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of *Lanfear v. Bloss*, 1 La. Ann. 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "where a bill of exchange drawn on a shipment, and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused, and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged." This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the

same effect was given in the commercial court of New Orleans by Judge Watts, who supported it by a very convincing opinion. 14 Hunt, Mer. Mag. 264. These decisions were made in 1845 and 1846. In other courts, also, the question has arisen. What is the duty of a collecting bank to which time drafts, with bills of lading attached, have been sent for collection? and the decisions have been, that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. In the case *Wisconsin Marine & Fire Ins. Co. v. Bank of British North America* (decided in 1861) 21 U. C. Q. B. 284, where it appeared that the plaintiff, a bank at Milwaukee, Wis., had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A. at Milwaukee on B. at Toronto, payable forty-five days after date, together with a bill of lading, indorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held, that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed in 1863 in the court of error and appeals, and the judgment affirmed. 2 U. C. Err. & App. 282. See, also, *Goodenough v. Bank*, 10 U. C. C. P. 51; *Clark v. Bank*, 13 Grant, Ch. 211.

There are also many expressions of opinion by the most respectable courts, which, though not judgments, and therefore not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In *Shepherd v. Harrison*, L. R. 4 Q. B., 493, Lord Cockburn said: "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention that the handing over of the bill of lading, and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction." The case subsequently went to the house of lords (5 H. L. 133) when Lord Cairns said: "If they (the drawees) accept the cargo and bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount, or use it as they think proper; and they are virtually paid for the goods." In *Coxenry v. Gladstone*, 4 L. R. Eq. 493, it was declared by the vice-chancellor that "the parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange" drawn against the goods, and attached to the bill of lading; and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the accompanying draft on account of the consignment was exceptional, and was not established as being the usual

course of business. In *Schuchardt v. Hall*, 39 Md. 590, which was a case of a time draft, accompanied by a bill of lading, hypothecated by the drawer, both for the acceptance and payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court: "Under their contract with the defendants, the latter were authorized to draw only against the cargo of wheat to be shipped by the *Ocean Belle*; and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See also the language of the judges in *Gurney v. Polrend*, 3 El. & Bl. 622; *Bank v. Wright*, 48 N. Y. 1; *Bank v. Daniels*, 47 N. Y. 631.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point determine nothing of the kind. *Gilbert v. Guignon*, L. R. 8 Ch. 16, was a contest between two holders of several bills of lading of the same shipment. The question was, which had priority? It was not all whether the drawee of a time draft against a consignment has not a right to the bill of lading when he accepts. The drawer had accepted without requiring the surrender of the first indorsed bill of lading; and the lord chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked, "If he was content they should remain in the hands of the holder, it was exactly the same thing as if he had previously and originally authorized that course of proceeding; and that (according to the chancellor's view) was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder of a time draft, to which a bill of lading is attached, as against the drawee. The contest was wholly inter alios.

Seymour v. Newton, 105 Mass. 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect, it was like *Gilbert v. Guignon*. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods; and all that was decided was, that, under the circumstances, the jury would be authorized to find that the lien of the shippers had not been discharged. It was a case of stoppage in transitu. It is true, that, in delivering the opinion of the court, Chief Justice Chapman said: "The obvious purpose was, that there should be no delivery to the vendee till the draft should be paid." But the remark was purely obiter, uncalled for by any thing in the case. *Newcomb v. Boston & L. R. Corp.*, 115 Mass. 230, was also the case of acceptance of sight drafts, without requiring the delivery of the attached bills of lading; and the contest was not between the holder of the drafts and the acceptor; it was between the holder of the drafts with the bills of lading and the carrier. We do not perceive that the case has any applicability to the question we have now under

consideration. True, there, as in the case of *Seymour v. Newton*, it was remarked by the judge who delivered the opinion, "The railroad receipts were manifestly intended to be held by the collecting bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawees and the bank; for it is immediately added, "They continued to be held by the bank after the drafts had been accepted by Chandler & Co. (the drawees), and until at Chandler & Co.'s request they were paid by the plaintiff; and the receipts with the drafts still attached were indorsed and delivered by Chandler & Co. to the plaintiff." In *Stollenwerk v. Thacher*, 115 Mass. 224 (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft; and it was held that the special agent, thus instructed, could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In *Bank v. Bayley*, Id. 228, where the instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance was refused, Chief Justice Gray said: "The drawees of the draft attached to each of the bills of lading were not entitled to the bill of lading, or the property described therein, except upon acceptance of the draft." It is but just to say, however, that this remark, as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying, that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft.

If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce,

having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. *Warren v. Bank*, 10 Cush. 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said to the instruction given by the learned judge of the circuit court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case to say that it was a mistake to charge the jury, as they were charged, that "in the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the bill of lading from the bill of exchange, and surrender it before the bill of exchange was paid." And again: there was error in the following portion of the charge: "But if the Metropolitan Bank merely sent to the defendant bank the bills of exchange with the bills of lading attached for collection, with no other instructions, either expressed or implied from the past relations of the parties, they would not be so justified in surrendering (the bills of lading) on acceptance only." The Bank of Commerce can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts, only after special instructions to retain the bills until payment of the acceptances. The drafts were all time drafts. One, it is true, was drawn at sight; but, in Massachusetts, such drafts are entitled to grace.

What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the circuit court is reversed, and the record is remitted with directions to award a new trial.

BAKER v. CHICAGO, M. & ST. P. RY. CO.

(67 N. W. 376.)

Supreme Court of Iowa. May 22, 1896.

Appeal from district court, Woodbury county; S. M. Ladd, Judge.

Action for the value of goods shipped over defendant's line of road. Judgment for the plaintiff, and the defendant appealed. Reversed.

Taylor, Shull & Farnsworth, for appellant. Lynn & Foley, for appellee.

GRANGER, J. 1. The case on appeal presents two causes of action, the first being for dates, cranberries, and cabbage shipped from Sioux City to Hawarden, in Iowa. They were consigned to L. M. Lake, who refused to receive them, and the company sold them to third parties for two dollars. The petition charges a conversion by the defendant. The court instructed the jury that the plaintiff was entitled to recover the fair and reasonable value of the articles less the charges for transportation. The value, as alleged, is \$10.30. The jury allowed plaintiff \$6. There is, in argument, as there should be, a concession that there was a conversion of the goods. The court left it to the jury to fix the amount, and there is testimony to show that the articles were worth from \$10 to \$12. There is no reason why we should disturb the finding of the jury, and the judgment in that particular will stand affirmed.

2. The other cause of action is for a car load of apples shipped from Boston, Mass., to Yankton, S. D. The apples were purchased for plaintiff by one Stickney about November 21, 1892, and shipped by the National Dispatch & Transfer Company to Chicago, and from there to Yankton by the defendant company's line of road, reaching there about December 4, 1892. After the shipment, the plaintiff, through defendant's agent at Sioux City, attempted to have the destination of the car changed to Sioux City, but it was not done. The purchase in Boston was made from York & Whitney, and the shipment was made by that firm to itself at Yankton. In making the purchase Stickney paid, on the car load, \$100, and for the balance—\$324—a draft was attached to the bill of lading by York & Whitney, and sent to the bank at Sioux City for collection. The plaintiff resided at Sioux City, and at Yankton there was no one to receive the apples, and after some time they were stored, and afterwards, in February, 1893, shipped to Sioux City, at the request of plaintiff. On reaching Sioux City they were found to be of no value, and plaintiff refused to accept them. The court, in charging the jury, stated the claims of the parties as follows: "The plaintiff claims that through his agent, Stickney, he purchased a car load of 150 barrels of apples in Boston, and paid \$100 thereon, that the sellers, York & Whitney, as a condition of said sale, told

plaintiff said apples were plaintiff's, and to have said apples shipped as plaintiff might wish, and to pay therefor when said apples reached their destination; that Stickney, the agent of plaintiff, caused said apples to be shipped in the name of York & Whitney to said York & Whitney at Yankton, S. D., and that said apples were so shipped and reached said Yankton, and that while there, by reason of the negligence of defendant, they were wasted, and lost by decay. The defendant claims that the car of apples was shipped by York & Whitney to themselves as consignee, and that the apples were not to be delivered until the balance due thereon was paid for; and at the time of the injury, if any, to said apples they were the property of York & Whitney, and not of plaintiff; and defendant further claims that it exercised due diligence in the care of said apples." The court presented to the jury two questions: First, whether by the purchase at Boston plaintiff became the owner of the apples, before he obtained the bill of lading, by the payment of the balance of the purchase price; and, second, if he did, then whether the defendant was negligent in caring for the apples at Yankton. In expressing the law as to what would amount to a transfer of title at Boston, so that the plaintiff would be the owner, the court said to the jury, in substance, that if there was an agreement by which the apples were plaintiff's, and there was no condition that the bill of lading was not to be delivered until the balance of the purchase price was paid, they became the property of plaintiff, so that he could recover. It then stated as follows: "If, however, you find from the evidence that the plaintiff, through his agent, Stickney, purchased the apples from York & Whitney in Boston, and paid \$100 thereon, and that nothing was said concerning the payment of the balance, or that it was agreed that the balance should be paid upon the delivery of the bill of lading to plaintiff, and it was arranged that the bill of lading should be made out to York & Whitney, to be turned over to plaintiff upon the payment of the balance due on the apples, then the apples would not become the property of the plaintiff until he received the bill of lading. So, too, unless you find that York & Whitney at the time of the purchase told Stickney that the apples were his, and he had accepted them, and that he could ship them as he pleased, and the bill of lading was made out to York & Whitney as consignees at the instance of Stickney, the property did not pass to the plaintiff until he had received the bill of lading at Sioux City; and if you find under this instruction that the property did not pass to plaintiff until he received the bill of lading in Sioux City, then he did not become the owner of said property until after the injury, if any, occurred, and he could not recover the damages, if any, to said apples." These rules of law are not questioned, and in the light of them we may con-

sider an assignment of error that the court erred in refusing to direct a verdict for the defendant because the plaintiff had no ownership of the property in controversy. It will be seen that it is the law of the case that, if nothing was said concerning the payment of the balance, or that it was agreed that the balance should be paid on the delivery of the bill of lading to plaintiff, and it was arranged that the bill of lading should be made out to York & Whitney, to be turned over to plaintiff upon the payment for the balance of the apples, then they would not become the property of plaintiff until he received the bill of lading. The purchase was made by Stickney, and his is the only testimony from which it can be known what the understanding at Boston was. There had been other transactions between York & Whitney and plaintiff, but they do not aid the question. Stickney, on his direct examination, makes some statements that, disconnected from his cross-examination, might leave the conclusion in doubt as to the purpose of sending the draft for collection with the bill of lading. It will be seen that the law as stated makes the absence of evidence to show an understanding that plaintiff was to have the apples regardless of the bill of lading fatal to plaintiff. The fact of such a right must be made to appear to overcome the legal inference from sending the draft for collection with the bill of lading. The following is the statement of Stickney on cross-examination: "The last time I was in Boston I bought these six cars of apples. Did not pay for them at that time in full; not the six cars. The car in question was one of the six. The bills of lading for the other cars were all forwarded to Mr. Baker, I expect. I had possession of the bill of lading there. I took it to York & Whitney, and gave them possession of it. They sent it, with the draft, to the bank here,—the draft for the balance of the one car load of apples. Mr. Baker couldn't get them until he paid that draft. I don't know of any contract or arrangement between York & Whitney and myself and Mr. Baker by which Mr. Baker could come into possession of that bill

of lading without paying for the apples. There was nothing said about that, that I know of." In his direct examination there is nothing actually in conflict with these statements, when carefully considered. He had before made purchases, and paid for them, and similar shipments had been made except as to bills of lading which were sent directly to plaintiff. On his direct examination he says, after speaking of other shipments: "When I bought these cars I suggested to him perhaps he had better ship them to his own order, not being very well acquainted with Mr. Baker, and send the draft with the bill of lading." The witness further said on his direct examination: "I asked him if I paid him one hundred dollars for each car if it would be all right; that he would ship the apples right through; and he said 'Yes,' it would be all right; it didn't make any difference about that. I suggested to him, if it wasn't all right whether it was or not, he could attach the draft to the bill of lading. He had never known Mr. Baker except what transactions I had done with him the last four or five weeks, and he said that would be all right; and I gave him directions where to ship each car." This evidence is without practical conflict. There are general statements seemingly so; but at all times when the thought of payment is the controlling one there is nothing to indicate that the title was to pass before payment. There is no phase of the evidence on which there can be a recovery under the instructions, and hence the court should have directed a verdict for defendant on this branch of the case. This conclusion renders it unnecessary to consider the question of negligence or a failure to stop the car at Sioux City. As to the latter, however, it may be said that the court instructed the jury that there was no evidence to show that defendant ought to have so stopped the car.

The costs as to the branch of the case we affirm are but nominal, and the costs of the appeal will be taxed to appellee, and the judgment as to the claim for apples will stand reversed.

FREEMAN v. KRAEMER et al.

(65 N. W. 455.)

Supreme Court of Minnesota. Dec. 19, 1895.

Appeal from municipal court of Duluth; Roger S. Powell, Judge.

Action by C. F. Freeman, doing business as C. F. Freeman & Co., against P. G. Kraemer and others, for conversion. From an order denying a new trial, after a verdict for plaintiff, defendants appeal. Affirmed.

L. U. C. Titus, for appellants. Jaques & Hudson, for respondent.

CANTY, J. On November 26, 1894, plaintiff shipped a car load of oats and a car load of hay from Roberts, Wis., to one Stevenson, a commission merchant at Duluth, Minn. A bill of lading or shipping receipt, whichever it may be called, was issued by the railway company to plaintiff (as C. F. Freeman & Co.) for each car. One of these bills of lading, as far as here material, reads as follows: "Chicago, St. Paul, Minneapolis & Omaha Railway Co. No. car, 12,444. Roberts Station, Nov. 26, 1894. Received of C. F. Freeman & Co., in apparent good condition, marked, Geo. F. Stevenson, Duluth, Minn.: Articles, baled hay, weight 20,400, as described above; contents and value unknown; to be transported by the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the destination named above. * * * J. E. Bethel, Agent." The other bill of lading is in the same form. A few days prior to this, Stevenson wrote plaintiff offering \$12 per ton for one car of hay, and 31¼ cents per bushel for one car of oats, and the shipment to him was in response to his offer. Immediately on shipping the two cars, plaintiff drew one draft for the price of the hay, and attached it to the bill of lading for the car of hay, and drew another draft for the price of the oats, and attached it to the bill of lading for the car of oats. These drafts were drawn on Stevenson in favor of plaintiff's banker at Roberts, who forwarded them, with the attached bills of lading, to another banker at Duluth, for collection, but the drafts were not discounted. These drafts arrived in Duluth and were presented to Stevenson for payment on November 28th, but he refused to pay them, giving as an excuse that the cars had not yet arrived. The cars had arrived on the 27th, and on the 28th the railway company, on the order of Stevenson, delivered them to defendants, who claim that they bought the oats and hay from Stevenson in good faith, and paid him in full for the same. The 29th of November was a legal holiday, and on the next day the Duluth banker attempted to find Stevenson, and again demand payment of the drafts from him, but he could not be found. Thereupon the drafts and bills of lading were returned to plaintiff, who proceeded to Duluth, and demanded the oats and hay of defendants, who refused to deliver the same to him, and this action was brought for damages for the

conversion of the same by defendants. On the trial the court ordered the jury to return a verdict for plaintiff for the value of the property, and from an order denying their motion for a new trial defendants appeal.

We are of the opinion that the order appealed from should be affirmed. It clearly and conclusively appears from the evidence that the sale or contemplated sale from plaintiff to Stevenson was to be a cash transaction. No indicia of ownership was given to Stevenson. On the contrary, the bills of lading were forwarded by plaintiff, with the drafts attached to them, in such a manner as to make the intended delivery of the bills to Stevenson concurrent with the payment of the drafts for the purchase price of the property. From the circumstances, it conclusively appears that plaintiff did not intend to vest the title to the property in Stevenson until the goods were paid for. Of course, where, on an absolute sale of goods, credit is given, so that the delivery and payment of the purchase price are not intended to be concurrent acts, the delivery is absolute, and, in the absence of fraud or mistake, there is no way of reverting the goods in the vendor, except by the exercise of the right of stoppage in transitu. Where it is a conditional sale on credit, the title not to pass until paid for, it is void as against subsequent purchasers in good faith for value, unless the proper evidence of the transaction is filed of record, pursuant to sections 4148 and 4149, Gen. St. 1894. But this statute has no application to cash sales. *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 231, 46 N. W. 342, 560. Where the sale is to be a cash transaction, if the vendee gets possession before the purchase price is paid, his possession will, at least for a short period, be regarded as merely conditional, and of such a character that he cannot vest a purchaser from him with title. *National Bank of Commerce v. Chicago, B. & N. R. Co.*, supra; *Benj. Sales* (6th Ed., Am. notes) p. 282. See, also, *Emery v. Bank*, 25 Ohio St. 359; *Bank v. Kelly*, 57 N. Y. 34; *Bank v. Daniels*, 47 N. Y. 631; *Bank v. Jones*, 4 N. Y. 497,—which are cases similar in principle to this.

2. Appellants contend that plaintiff had conferred indicia of ownership on Stevenson, and that this gave Stevenson power to vest title by estoppel in appellants. In view of the authorities just cited, it is hardly necessary to say that merely shipping the goods addressed to the consignee, while retaining the bills of lading, confers no indicia of ownership on the consignee.

3. It is also contended that the instruments delivered to plaintiff by the railway company in this instance were not bills of lading, but what counsel terms mere "shipping receipts," and that the retention by the consignor of these receipts was not a retention of the indicia of ownership, but that the same passed to the consignee. Whether, if counsel's premises were correct, his conclusion would be, we need

not consider. These instruments consist each of a receipt for the goods, and an agreement to transport them to a certain place, and, in our opinion, are bills of lading. See *Railway Co. v. Johnston* (Neb.) 63 N. W. 144.

4. There is nothing in the point that plaintiff failed to establish his ownership or right to possession of the property. He must have been in possession of the property when he shipped it. It is true that it appears from the evidence that, in answer to Stevenson's first

inquiry for hay, plaintiff stated that he had no hay, but that another party at Roberts had some, which he was going to press. In response to Stevenson's second inquiry for hay and oats both, plaintiff shipped the two cars, but never in any manner claimed to be acting for said third party (whose name is nowhere disclosed), nor for any one but himself, in making such shipment.

This disposes of the case, and the order appealed from is affirmed.

FIFTH NAT. BANK OF CHICAGO v.
BAYLEY.

(115 Mass. 228.)

Supreme Judicial Court of Massachusetts.
Suffolk. June 18. 1874.

Replevin for four hundred barrels of flour. In the superior court judgment was ordered for the plaintiff on agreed facts in substance as follows, and the defendant appealed to this court:

On June 5 and 6, 1871, R. H. Sage owned and shipped at Chicago for Boston five hundred barrels of flour by bills of lading whereby the flour was deliverable to his own order. On the same days he made drafts in favor of J. G. Lombard, the plaintiff's cashier, upon E. Williams & Co., Boston, one for \$1,800, and the other for \$1,000, and attached the bills of lading thereto, and indorsed on each bill of lading, "Deliver the within to the order of E. Williams & Co. R. H. Sage," and delivered the bills of lading to the plaintiff as collateral security for the payment of the said sums which the plaintiff advanced him thereupon. The plaintiff then forwarded all the papers to Boston for collection.

These drafts were duly presented to E. Williams & Co., who refused to accept them, and they were immediately returned to the plaintiff.

On June 13, when the \$1,000 draft was received by the plaintiff in Chicago, Sage delivered to the plaintiff, in exchange for it, a draft on Crockett Bros. for \$1,000, and for the returned bill of lading which was delivered up to the transportation company, a new original bill of lading, indorsed: "Deliver to the order of Crockett Bros. R. H. Sage." The plaintiff then forwarded all the papers to Boston for collection.

On June 16th, when the \$1,800 draft on E. Williams & Co. arrived in Chicago, Sage paid the plaintiff on account \$300, and delivered to the plaintiff, in exchange for the balance of the returned draft, a new draft for \$1,500, on Crockett Bros., and for the returned bill of lading, which was delivered up to the transportation company, a new original bill of lading, indorsed: "Deliver to the order of Crockett Brothers. R. H. Sage." The plaintiff then forwarded all the papers to Boston for collection.

Both lots of flour arrived in Boston, and while in the carrier's hands, two hundred barrels were attached by the defendant, a deputy sheriff, upon a writ in favor of a creditor of Sage, on June 16th, and two hundred barrels on June 19th.

Crockett Bros. refused to accept the drafts, which, with the other papers, were then immediately returned to the plaintiff, who again, and after the attachments had been made, exchanged the bills of lading for bills of lading indorsed to the plaintiff, and upon them received from the carrier the one hundred barrels not attached. The plaintiff then duly made demand on the defendant for the attached flour, and the defendant refused to deliver it to the plaintiff; and thereupon the plaintiff replevied the same in this action.

E. H. Abbot and L. A. Jones, for plaintiff.
G. O. Shattuck and O. W. Holmes, Jr., for defendant.

GRAY, C. J. This case is governed by those of *National Bank of Cairo v. Crocker*, 111 Mass. 163, and *National Bank of Green Bay v. Dearborn*, 115 Mass. 219.

The bills of lading by which the carrier undertook to deliver the goods to the shipper or his assigns were representatives of the property. The delivery of those bills of lading to the plaintiff corporation as collateral security for the payment of its advances, although it would not have enabled it to sue the carrier upon the contract therein made with the shipper, yet did transfer at least a special property in the goods to the plaintiff, (for which its discount of the drafts was a valuable consideration,) and gave it a right of immediate possession sufficient to maintain replevin against the shipper or any one attaching the goods as his property.

The drawees of the draft attached to each of those bills of lading were not entitled to the bill of lading or the property described therein, except upon acceptance of the draft, and, having refused to accept it, the order, indorsed by the shipper upon the bill of lading, for the delivery of the goods to the drawees, never took effect. Judgment for the plaintiff.

ENDICOTT and DEVENS, JJ., absent.

KIMBALL et al. v. SAGUIN.

(53 N. W. 116, 86 Iowa, 186.)

Supreme Court of Iowa. Oct. 7, 1892.

Appeal from district court, Pottawattamie county; H. E. Deener, Judge.

This is an action upon a promissory note executed by defendant Saguin to defendant William Siedentopf or order, by whom it was assigned to defendant Farnsworth, by him to the First National Bank of Council Bluffs, and by said bank to the plaintiff. Saguin alone defends, and alleges that said note, together with \$1,500 in cash, was given to Siedentopf in consideration of a conveyance to defendant of certain real estate by said Siedentopf; that for the purpose of inducing defendant to make said purchase and to pay said money and execute said note, the said Siedentopf made certain false and fraudulent representations concerning the title in himself to said real estate, knowing the said representations to be false; that, relying upon said false representations as true, he, the defendant, was induced to pay said money to execute said note to Siedentopf, and to receive from him his deed of conveyance for the real estate so purchased; and that the title so conveyed to him has wholly failed; wherefore he says there is no consideration for said note. He alleges that neither the plaintiffs, nor either of the assignees of said note, were bona fide purchasers thereof for value before due without notice, wherefore he asks that said note be fully canceled. Issues were joined by reply, the case submitted to a jury, and a verdict for defendant Saguin, with certain special findings, returned. Judgment was entered upon the verdict and findings in favor of defendant Saguin. Plaintiffs appeal.

Finky Burke, George W. Hewitt, and W. H. Ware, for appellants. A. T. & I. N. Flickinger, for appellee.

GIVEN, J. 1. The conveyance from Siedentopf to Saguin was with limited covenants, as follows: "Do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons claiming by, through, or under me." The failure of title alleged was not by reason of any person claiming through or under the defendant Siedentopf, but because of his having no valid title to the property conveyed. There is no allegation of a breach of the covenant in the deed, or of a verbal warranty and breach thereof; but the defense is fraud and deceit in knowingly and fraudulently misrepresenting the title held by the grantor. Appellants contend that an action or defense for deceit in misrepresentation of title will not lie; that the only remedy for a failure of title is upon the covenants in the deed; and that, where these are limited, the purchaser takes all risks not covered by the limited covenant; and if there be no covenant, as in case of a quitclaim deed, he takes all risks as to title; that when it is intended that the vendor shall answer for the title, covenants are inserted in the deed that

define the terms of the contract; that covenants will not be implied; and that the purchaser takes the title at his own risk, except as it may be warranted by covenants in the deed. In considering the question before us we must keep in mind the distinction between an action for a breach of warranty and an action for fraud and deceit. Appellant cites cases wherein the courts have either expressed doubts upon the right to maintain an action for fraudulent representations as to the grantor's title, or the opinion that such an action could not be maintained, but an examination of these cases shows that the question before us was not involved nor determined. In *Leonard v. Pitney*, 5 Wend. 39, Marcy, J., says: "Doubts may well be entertained whether an action at law will lie for a deceitful and false representation of title in the vendor of real estate. Such an action has not as yet, I believe, been sustained, except, it may be, in some of the states where the same tribunal is possessed of equity jurisdiction as well as the powers of a court of common law. There is, however, no occasion now to examine that question." In *Frost v. Raymond*, 2 Caines, at page 192, the court recognizes the rule "that, if there be no covenant of title in a deed, the purchaser takes, at his own risk, the goodness of the title." It is said "the parties to deeds know that a covenant is required to hold the seller to warrant the title, and they regulate their contract accordingly. If there be any fraud in the sale the purchaser has his remedy. If one sell land, affirming he had a good title, when he had no title, an action on the case for a deceit will lie." Here the distinction between an action on a contract of warranty and for a deceit is recognized, and the case is authority for the right to maintain an action for deceit. In *Whitney v. Allaire*, 1 N. Y. 305, it is said that it is a strong argument against the action for falsely representing the title that no precedent for it has been found. It is further said: "It is not necessary in this case to decide whether an action will lie for a false and fraudulent representation by the vendor of real estate that he has title to the property; for that question seems not to have been made on the trial." The only case from other states wherein this precise question has been determined, that we are able to find, is *Peabody v. Phelps*, 9 Cal. 213. At page 226, the court states the question to be "whether an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate can be maintained by the purchaser, who has taken possession of the premises sold under the conveyances with express covenants." The covenant in that deed was to warrant and defend the title "from me and my heirs and assigns forever." The court says: "The precise question does not appear to have been directly decided. There are dicta in the Reports, but we have been unable to find any adjudicated case on the exact point." The conclusion reached in that case is that the

action could not be maintained. We think, however, that the reasoning of the learned judge shows that the distinction between an action for deceit and for breach of warranty was lost sight of. While this case was not overruled in *Wright v. Carrillo*, 22 Cal. 596, its correctness was questioned. In commenting upon it the court says: "There are certain very strong reasons for contending that a person obtaining money by false and fraudulent representations respecting his title to land should be compelled to repay it,—as much so as the seller of a horse or other personal property; and the fact that the vendee has neglected to secure himself by proper covenants of warranty should be no defense. The fraud may have been perpetrated and falsehood employed for the very purpose of inducing the vendee to take the conveyance without any or with insufficient covenants. That fraud has been successful has never been supposed to deprive the party defrauded of all remedy. The power of a court of equity, as well as of law, has heretofore been considered most potent in such cases; but if such be the law, they are powerless in the most aggravated cases of deceit. The ruling upon this point in *Peabody v. Phelps*, is clearly in conflict with the decision in *Alvarez v. Brannan*, 7 Cal. 504, and it should be reinvestigated in some case where it can properly be adjudged, and upon sufficient argument of the question." *Ballou v. Lucas*, 59 Iowa, 22, 12 N. W. 745, was an action in chancery to rescind a sale and conveyance of land on account of fraudulent representations as to the title. Defendant insisted that, as the contract of purchase called for a quitclaim deed, and plaintiff had accepted such a deed, "he has no remedy against defendant for the fraudulent representations as to the title of the land." The court says: "The position is based upon the familiar rule that one who takes lands under a quitclaim deed is not to be regarded as a bona fide purchaser without notice of outstanding titles and equities. But this doctrine is not applicable to this case. It prevails in settling conflicting titles, and is intended to protect equities as against those charged with notice of their existence. It is never invoked to protect a fraudulent grantor, who, by false representations, induces a confiding purchaser to believe that he acquires a good title under a quitclaim deed. * * * It would be a reproach to the law to hold that a vendor who, by fraudulent representations, has induced a vendee to accept a quitclaim deed for land, can wholly escape liability for his fraud."

This case is decisive of the question before us, and leads us to the conclusion that the contention of appellants on this point is not well founded.

2. Appellants complain of certain rulings in admitting and rejecting testimony. They offered to prove that Saguin knew of the defects in the tax title upon which the conveyance to him was based, and that he could purchase the patent title at less than \$10 per lot. They also offered to prove the price at which the patent title had been purchased by others. This evidence was properly excluded. There was no question of damage submitted to the jury. The issues submitted were as to the alleged fraud, failure of title, and consideration in the note, and whether appellants were purchasers for value before due without notice. Saguin was not bound to prevent a failure in the consideration of the note by buying the patent title, even if such a purchase would have prevented it. After the evidence was closed and the argument commenced, appellants offered to prove by the assistant cashier of the bank that he had no notice of any defenses to the note at the time the bank received it. It was in the discretion of the court whether or not to then admit further evidence, and there is nothing to show that this discretion was not properly exercised. Appellants complain that they were improperly restricted in the cross-examination of the defendant Saguin and the witness Flickinger. The record does not justify the complaint. Most of the questions were not proper cross-examination, and others were immaterial, or subsequently answered. A question put to appellee in chief was objected to as leading, and the objection overruled. The witness was asked what Siedentopf said with reference to himself or his grantor's having had actual possession of the property. No answer was suggested by the question,—only the subject upon which Siedentopf's statements were desired. We discover no errors in the rulings admitting and rejecting testimony.

3. Appellants' further complaint is that the court erred in not setting aside the verdict and special findings. The verdict and findings are in harmony, and have support in the evidence. The case was fully and fairly submitted to the jury, and, although we might arrive at a different conclusion from the evidence, we may not for that reason disturb the verdict. There being evidence to support the verdict, and there being no prejudicial errors in the submission of the case, the judgment of the district court is affirmed.

MORSE et al. v. SHAW.

(124 Mass. 59.)

Supreme Judicial Court of Massachusetts.
Hampden. Feb. 8, 1878.

Replevin of wool. At the trial in the superior court, before Rockwell, J., the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

G. M. Stearns and N. A. Leonard, for plaintiffs. G. F. Hoar, for defendant.

MORTON, J. The plaintiffs seek to avoid a sale, upon the ground that they were induced to make it by false and fraudulent representations of the defendant. The burden is upon them to show that the defendant knowingly made false representations of matters of fact which are susceptible of knowledge. Representations which are mere expressions of opinion, judgment or estimate, or intended as expressions of belief only, are not sufficient to support the action. They must be statements of facts susceptible of knowledge, as distinguished from matters of mere belief or opinion. *Safford v. Groat*, 120 Mass. 20; *Litchfield v. Hutchinson*, 117 Mass. 195.

At the trial of this case, the presiding justice stated these principles of law with substantial correctness, and the defendant does not complain of the rulings in this respect. But he contends that the only representations proved in the case were expressions of opinion or belief as to the defendant's ability to pay his debts, and that, therefore, under rules of law adopted by the presiding judge, he should have instructed the jury, as requested, that the evidence would not warrant a verdict for the plaintiffs.

The evidence tended to show that, in January, 1876, the defendant went to the plaintiffs to buy wool, and, after some conversation as to his business condition and credit, agreed to go home and prepare a statement of his affairs; that, in the February following, he again called upon the plaintiffs, took out a memo-

randum book, apparently read it, and said: "I want to tell you how I stand. I could pay every dollar of indebtedness of mine, including the mortgages on my real estate, and not owe on that real estate more than \$15,000 to \$20,000." It appeared that he had a large and valuable real estate. The statement is equivalent to a representation that he had, independently of his real estate, property enough to pay all his debts except \$20,000.

Such a representation may be susceptible of either of two interpretations. It may be intended as a willfully false statement of a fact, and may be understood as a statement of a fact. Or it may be intended as the expression of the opinion or estimates which the owner has of the value of his property, and may be so understood. Suppose, for instance, that a man who owns property worth \$1,000, for the purpose of procuring credit, represents that he is worth or that he has property worth \$100,000. It would be self-evident that he intended to misrepresent facts, and such misrepresentation would be a fraud. But, if the same man should represent that he had property worth \$1,500, it might well be regarded as an expression of his judgment or estimate of value, and therefore not an actionable fraud. In such cases, it is for the jury to determine whether the representations were intended and understood as statements of facts, or mere expressions of opinion or judgment. In the case at bar, the court could not say, as matter of law, that the statements made by the defendant as to his property and debts were mere expressions of his opinion or belief, and not statements of facts. All the evidence was before the jury, disclosing the circumstances and condition of the defendant and his property, and it was properly left to them to decide whether the statements proved were false and fraudulent representations of material facts.

Exceptions overruled.

ENDICOTT and LORD, JJ., absent.

LITCHFIELD v. HUTCHINSON.

(117 Mass. 195.)

Supreme Judicial Court of Massachusetts.
Middlesex. Feb. 1, 1875.

Tort for deceit in the sale of a horse. The declaration alleged that the defendant sold plaintiff a horse for \$325; that defendant falsely represented that the horse was sound in every way, to induce plaintiff to buy; that the plaintiff, believing that said representation was true, was thereby induced to buy the horse, but the horse was not sound in every way, but was lame and foundered, and lame in the fore legs and shoulders, and was unsound and of little value, as defendant well knew. Answer a general denial. The court allowed a bill of exceptions to the effect that there was evidence that the defendant made the representations as alleged; that they were false, and known by defendant to be false; that the plaintiff, relying thereon, was induced to purchase the horse as alleged; and that the horse was then in fact lame and unsound. The evidence was conflicting on all these points. Plaintiff paid defendant \$325 for the horse, and there was evidence that he was not worth at the time of the sale over \$100. The defendant testified that he made no representations whatever, and that he had worked the horse almost every day for three weeks, and did not observe any lameness or that he was unsound. Upon this evidence the plaintiff requested the judge to charge that, if the defendant made a representation of the soundness of the horse as of his own knowledge, he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound, and if the plaintiff relied on such representations, and was induced thereby to purchase the horse, and thereby sustained damage, the defendant was liable. If the defendant represented that the horse was sound, when he was unsound, and the plaintiff was thereby induced to buy the horse, and was thereby injured, then the defendant was liable. If the defendant knew the horse was unsound, and did not make such fact known to the plaintiff, but allowed him to purchase the same at a fair market price as a sound horse, then the defendant was guilty of fraud, and was liable. If the defendant had no knowledge one way or the other as to the soundness of the horse, but represented to the plaintiff that he was sound, and he was in fact unsound, it would support the allegation that he made to the plaintiff a false allegation knowingly. If the defendant made the representations to the plaintiff without any knowledge, information, or ground of belief, and they were in fact false, it would not differ legally from a representation known by the defendant to be false. The judge, instead, instructed the jury that if the defendant made the representations alleged, as matter of fact within his own knowledge, and the represen-

tations in any material respect were not true, and the defendant knew they were false, or he did not honestly believe them to be true, and the plaintiff, relying upon them as true, was induced to purchase the horse and pay therefor, the defendant was liable. But that the action could not be maintained by merely proving that the defendant had reasonable cause to believe the representations were untrue; the declaration alleging that they were fraudulently made, and that the defendant knew them to be false, and that a false representation is knowingly made when a party, for a fraudulent purpose, states what he does not believe to be true, even though he may have no knowledge on the subject. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

D. S. Richardson (G. F. Richardson, with him), for plaintiff. W. S. Gardner, for defendant.

MORTON, J. This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was, in fact, unsound and lame, all of which the defendant well knew.

To sustain such an action it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defence that he believed the facts to be true. The falsity and fraud consists in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge. Page v. Bent, 2 Metc. (Mass.) 371; Stone v. Denny, 4 Metc. (Mass.) 151; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, Id. 503.

In the case at bar the plaintiff asked the court to instruct the jury "that if the defendant made a representation of the soundness of the horse, as of his own knowledge, and the jury are satisfied that he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound as a matter of fact, and if the plaintiff relied on such representations, and was induced thereby to purchase the horse, and thereby sustain damage, then the defendant is liable." We are of opinion that this instruction should have been given in substance. If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge, and a representation by the defendant made as of his own knowledge that such defect did not exist, would, if false, be

a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him.

A false representation of this character is sufficiently set forth in the declaration to constitute a cause of action, without the further allegation that the defendant well knew the representations to be false. It is not necessary that all the allegations should be proved if enough are proved to make out a cause of action.

The instructions given upon the subject embraced in this prayer required the plaintiff to prove, not only that the defendant made the false representations alleged, as of his own knowledge, but also that the defendant knew that they were false, or that he did not honestly believe them to be true. In this respect the instructions were erroneous.

Exceptions sustained.

AMES and ENDICOTT, JJ., absent.

GALLOWAY et al. v. MERCHANTS' BANK
OF NELIGH et al.

(60 N. W. 569, 42 Neb. 259.)

Supreme Court of Nebraska. Oct. 16, 1894.

Appeal from district court, Antelope county; Allen, Judge.

Action by William C. Galloway and wife and others against the Merchants' Bank of Neligh and Henry L. Pratt. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. M. Robertson, for appellants. N. D. Jackson, for appellees.

HARRISON, J. April 30, A. D. 1891, the appellees herein filed a petition in the district court of Antelope county alleging in substance, after pleading the corporate character of appellant and defendant the Merchants' Bank of Neligh: That on or about January 25, 1889, appellees were indebted to the bank, and being desirous of effecting a loan on some real estate then owned by them, and situated in Antelope county, in order to pay the debt to the bank, and being solicited by the bank to make an application to or through it for such loan, made an application in writing, in which all the terms and conditions of the loan to be made were generally stated, except that no mention was therein made of the rate of interest which should be paid on the money loaned if the loan should be obtained; the contract in regard to the rate of interest to be paid by appellees on any loan effected for them being that they were to pay such a rate of interest as might be demanded by the party with whom the loan was negotiated or effected, and no more; the bank not to charge or receive any commission or bonus for making the loan. It was further agreed that the president of the bank should go east for the purpose of procuring the loan; the appellees to pay all the necessary expenses, etc., of the journey. Pursuant to this understanding a trip was made to New York by the president of the bank, and a loan of \$12,000 negotiated for appellees with one Henry L. Pratt, the rate of interest to be 7 per centum per annum. That the appellees executed notes for the \$12,000, payable to Henry L. Pratt or order, with interest at 7 per cent. per annum, and a real-estate mortgage to secure its payment, and executed 10 notes of \$120 each, payable to Henry L. Pratt or order or bearer; whether to order or bearer being one of the facts in dispute in the case, the appellees stating that these 10 notes were made payable to Henry L. Pratt or order, and altered after delivery, and without their knowledge, by the erasure of the word "order," and insertion of "bearer." These 10 notes were payable on the 1st of the months of January and July of the five years succeeding 1889, ending with January, 1894, and were secured by a mortgage on real estate in Antelope county, which was particularly described in the petition. That

appellees were induced to execute the 10 notes and the mortgage securing the same by the representations of the officers of the bank to the effect that Henry L. Pratt demanded 9 per cent. interest per annum on the \$12,000 loaned to appellees, but desired it divided as above indicated for his convenience, which representations were false and untrue, but were relied upon by appellees, and by them taken as true, and believed. That the bank retained the 10 notes and the mortgage securing them, and 3 of them were paid by appellees before they discovered that they belonged to the bank, and not to Pratt, and had been retained by it as a commission or bonus for making the loan, contrary to the terms of the agreement between the bank and appellees, and the further fact that Pratt had demanded and was to receive only 7 per cent. on the \$12,000 loaned. It is further alleged that they paid a bill of \$365, claimed by the bank to be the expenses of effecting and perfecting the loan. The prayer of the petition was for a cancellation of the remaining seven notes of \$120 each, and the mortgage securing them, the quieting of title in plaintiffs to the real estate covered by the mortgage, and a judgment against the bank for the amount of the three notes paid to it. The answer of the bank admitted the existence and corporate character of the bank, and denied each and every other allegation of the petition, except the payment of the three notes of \$120, and stated or admitted they were paid to Pratt. The answer filed for Henry L. Pratt admitted that the bank existed and was incorporated as stated in the petition; further, admitted the execution of the notes and mortgages as alleged in the petition, and that he made the loan of \$12,000 to bear interest at the rate of 7 per centum per annum, and stated that his understanding was and is that the 10 notes for \$120 each were for the sum charged by the bank as a commission for negotiating or effecting the loan of \$12,000, and denied all the other allegations of the petition, and, for further answer or cross bill, declared upon the 7 notes of \$120 each as belonging to and being owned by the defendant Henry L. Pratt, and asked for foreclosure of the mortgage securing them for alleged breach of its conditions in regard to payment of the notes. The appellees filed a reply to these several answers, in which all new matter in the answers was denied, and the fact of the alteration of the 10 notes was pleaded, and it was further alleged that Pratt was not the owner of the 7 \$120 notes, but that they had been delivered to him in fraud of appellees' rights, and to prevent them from obtaining relief in this action, and that Pratt well knew, and was informed at the time the notes were delivered to him, all the facts and circumstances attending their execution as pleaded in the petition.

A trial of the issues to the court resulted

in the following findings and decree, from which the bank and Pratt have appealed to this court, to wit: "It is remembered that on this 29th day of June, A. D. 1892, this cause came on to be heard before the court; the plaintiffs appearing by N. D. Jackson, their attorney; the defendants, by W. M. Robertson, their attorney. And the evidence was submitted to the court, and the court, after hearing the argument of counsel, and being fully advised in the premises, finds for the plaintiffs, and that the allegations contained in the plaintiffs' petition are true; that on or about the 25th day of January, 1889, the defendant the Merchants' Bank of Neligh negotiated for the plaintiffs a loan for the sum of \$12,000 from the defendant Henry L. Pratt; that the contract between the plaintiffs and the defendant the Merchants' Bank of Neligh for the negotiation of said loan was in writing, except the contract as to the rate of interest to be paid by the plaintiffs; that the defendant the Merchants' Bank of Neligh agreed with the plaintiffs at the time of the execution of said contract that the rate of interest on said loan would be such rate of interest as the said defendant the Merchants' Bank of Neligh would be enabled to negotiate said loan for in the east, and that the plaintiffs would not be required to pay any other or greater rate of interest than that for which the note could be negotiated, and that plaintiffs should not be required to pay the defendant the Merchants' Bank of Neligh any commission fees or charges, except the actual expenses incurred in negotiating said loan; that the said loan was negotiated for the purpose of paying an indebtedness to the said defendant the Merchants' Bank of Neligh; that at the time of the execution of the notes and mortgages securing the said loan the defendant the Merchants' Bank of Neligh falsely represented to the plaintiffs that the rate of interest demanded by the defendant Henry L. Pratt, to whom the said note had been negotiated, was 9%, and that the defendant Henry L. Pratt desired the plaintiffs to execute and deliver to the defendant Henry L. Pratt a note for the sum of \$12,000, drawing interest at the rate of 7% per annum, payable semiannually, and ten notes for the sum of \$120 each, representing the remainder of the 9% interest, one payable in six months from the date of execution of said notes, and one each six months thereafter, until said notes were fully paid; that thereupon the plaintiffs, relying upon the representation of the defendant the Merchants' Bank of Neligh, executed and delivered to the defendant the Merchants' Bank of Neligh, for the use and benefit of the defendant Henry L. Pratt, a note for the sum of \$12,000, drawing interest at the rate of 7% per annum, and a mortgage upon the property in Antelope county securing the same, and 10 notes of \$120 each, payable to Henry

L. Pratt or bearer, one payable on the 1st day of July, 1889, and one each six months thereafter, and, to secure the payment of said notes, executed and delivered to the defendant Merchants' Bank of Neligh, for the use and benefit of the defendant Henry L. Pratt, a mortgage upon the following described real estate, situate in Antelope county, Nebraska, to wit, block twenty-two (22) in the city of Neligh, and the said mortgage was filed for record in the office of the county clerk of Antelope county, Nebraska, on the 28th day of January, 1889, at three o'clock p. m., and recorded in Book W of Mortgages, at page 483; and that the plaintiffs also paid the defendant the Merchants' Bank of Neligh about the sum of \$365, expenses in negotiating said loan. The plaintiffs have paid the note for \$120 which matured on the 1st day of July, 1889, and the note for \$120 which matured on the 1st day of January, 1890, and the note for \$120 which matured on the 1st day of July, 1890. The court further finds that the defendant the Merchants' Bank of Neligh negotiated said loan to the defendant Henry L. Pratt at an agreed rate of interest, and that the rate charged and received by the defendant Henry L. Pratt was 7%, and no more; that the defendant Merchants' Bank of Neligh did not deliver to the defendant Henry L. Pratt the ten promissory notes of \$120 each, nor the proceeds thereof, but unlawfully, and in fraud of the plaintiffs' rights, converted said ten notes to their own use and benefit. The court further finds that the three notes paid aforesaid by plaintiffs were paid to the defendant the Merchants' Bank of Neligh, believing that said notes belonged to the defendant Henry L. Pratt, and before the discovery of the fact that the defendant the Merchants' Bank of Neligh had converted said notes to its own use. The court further finds that after the payment of the three notes aforesaid the defendant the Merchants' Bank of Neligh conveyed the remaining seven notes to the defendant Henry L. Pratt, but that the defendant Henry L. Pratt acquired the title and possession of said notes with a full knowledge of the facts hereinbefore enumerated. The court further finds that no consideration was ever paid by the defendant the Merchants' Bank of Neligh, or received by the plaintiffs, for the said ten notes of \$120 each, and the mortgage securing the same, and that said notes and mortgage are fraudulent and void, and that the plaintiffs are entitled to have the same surrendered to them, and the said mortgage canceled, and the cloud created thereby upon the title to the plaintiffs' property, to wit, block twenty-two (22) in the city of Neligh, Antelope county, Nebraska, removed. It is therefore considered, adjudged, and decreed by the court that the defendants surrender to the plaintiffs the seven notes of \$120 each, pay-

able as follows: One each on the 1st day of the months of January and July, 1891; one each on the 1st day of January and July, 1892; one each on the 1st day of January and July, 1893; and the one which matures on the 1st day of January, 1894,—and that the mortgage given to secure the same, to wit, the mortgage executed by the plaintiffs, and filed in the office of the county clerk of Antelope county, Nebraska, on the 28th day of January, 1889, at three o'clock p. m., and recorded in Book W of Mortgages, at page 483, be, and the same hereby is, canceled and annulled, and rendered wholly void and of no force and effect, and that the cloud created by the said mortgage upon the title of the plaintiffs be, and the same hereby is, removed, and the defendants, and each of them, are enjoined and restrained from claiming any lien, title, or other interest in said property by virtue of said mortgage, and that the plaintiffs have and recover from the defendant the Merchants' Bank of Neligh the sum of \$410, with interest thereon at the rate of seven per cent. per annum from this date. To all of which findings the defendants at the time excepted. And afterwards, to wit, on the same day, the said cause came on for hearing upon the motion of the defendants for a new trial; and the court, after hearing the argument of the counsel, and being fully advised in the premises, overruled said motion. To which order, ruling, and judgment of the court the defendants then and there duly excepted, and forty days are allowed to settle bill of exceptions. It is further ordered that the defendants have and recover from the plaintiffs herein the costs of this action, taxed at \$6.93. Plaintiffs except to that portion of the decree wherein the court finds that the notes in controversy were made payable to Henry L. Pratt or bearer."

The main contention of counsel for appellees in brief filed is that the findings and decree were not supported by the evidence. We have read and carefully examined all the testimony in the case, and deem it unnecessary to quote from it at large and comment upon it here, but a full consideration of it leads us to conclude that the determination of the district court was sustained by the evidence.

Counsel for appellants further contend that appellees should at least have offered to pay what it was reasonably worth to procure the loan, before asking to have the commis-

sion notes and their accompanying mortgage canceled, under the rule that "he who seeks equity must do equity." The evidence shows that they paid the bank \$365 for procuring the loan, or as expenses of the trip to New York by the president or officers of the bank to negotiate this loan, in exact pursuance of the terms of the agreement of the parties, as contended by appellees; and, having determined that the finding of the lower court that the contract was as alleged or claimed by the appellees was sustained by the testimony, the bank must be held to its terms, and, having been paid what it agreed to take according to such contract, it has received its whole compensation, and it was unnecessary for the appellees to offer to pay more before they were in a position to ask relief in a court of equity.

Having reached the conclusion that the findings of fact, as announced by the judge of the district court, were supported by the evidence, we must apply to them the rules which govern courts of equity in affording relief in cases of the nature of the one at bar; and we are satisfied that the case was one that, by its facts and circumstances, warranted the remedy granted. The rule has been stated in *Barnard v. Iron Co.* (Tenn.) 2 S. W. 25, as follows: "It is likewise true that where a party, intentionally or by design, misrepresents a material fact or produces a false impression in order to mislead another, or obtain an undue advantage of him, in every such case there is a positive fraud, in the fullest sense of the term. Nor can it be maintained that the evidence of the fraudulent representations is to be excluded, upon the doctrine that all representations are merged in the writings subsequently executed by the parties. This rule has no application when a suit is brought to be relieved against a written instrument on the ground of fraud. The purpose is not to contradict or vary the terms of the written agreement, but relief is sought upon the ground that by false representations the parties are entrapped into an agreement which they would not otherwise have made. It is not denying the deed, nor its terms, to insist that it is vitiated by fraud;" citing *Finlay v. King's Lessee*, 3 Pet. 382. See, also, *Insurance Co. v. Huyek* (Ind. App.) 32 N. E. 580, and citations. The decree of the district court is affirmed. Affirmed.

MAXTED v. FOWLER.

(53 N. W. 921, 94 Mich. 106.)

Supreme Court of Michigan. Dec. 22, 1892.

Error to circuit court, Manistee county;
J. Byron Judkins, Judge.

Action by John D. Maxted against Smith
W. Fowler. Judgment for plaintiff. De-
fendant appeals. Reversed.

Cahill & Ostrander, for appellant. Nis-
kern & Withey, for appellee.

MONTGOMERY, J. The plaintiff brought an action to recover damages for a breach of warranty alleged to have been made by defendant on an exchange of property owned by plaintiff for stock in a mining corporation transferred to him by the defendant. On a trial before a jury in the Manistee circuit a judgment was rendered for \$1,657.50. From this judgment defendant appeals.

The plaintiff's testimony tended to show that he exchanged property in Manistee, valued at \$1,800, for mining stock, which, at 75 cents per share, amounted to \$1,300, and \$500 in cash; that the defendant exhibited specimens which he claimed came from the mine of the company, and assured plaintiff that he (defendant) was going to make a rich man of him, and that the stock was then selling for \$1 per share, but that, as the company desired to engage plaintiff's services, and to have him interested, he would let him have the stock at 75 cents; that he (defendant) would make the stock worth \$2 a share inside of six months. The mine owned by the corporation was not developed, consisted of little more than an excavation, and the plaintiff testified that he was wholly unacquainted with mining property, and of this the defendant was advised. The circuit judge charged the jury: "If the defendant represented to the plaintiff that the stock was worth a dollar a share, that he would make it worth two dollars a share, and that the plaintiff relied upon and acted upon this representation, and turned out his property for the \$500 and the stock, and if the jury also find that the stock was utterly worthless, the plaintiff would be entitled to recover." Defendant's first contention is that these representations of value are not such as a purchaser has a right to rely upon. He invokes the rule that any purchaser must expect that the vendor will seek to enhance his wares, and must disregard the vendor's statements as to value. This is undoubtedly the general rule, but it is subject to exceptions. Where the defendant knows that the plaintiff is wholly ignorant of the value of the property, and knows that he is relying upon the defendant's representation, and such representation does not take the form of a mere expression of opinion, and is in the nature of a statement of fact, the rule

of caveat emptor does not necessarily apply. *Picard v. McCormick*, 11 Mich. 68; *Manning v. Albee*, 11 Allen, 529; *Lawton v. Kittredge*, 30 N. H. 500; *Bradley v. Poole*, 98 Mass. 169; *Miller v. Barber*, 66 N. Y. 558; *Gerhard v. Bates*, 20 Eng. Law & Eq. 129. We think, under the circumstances of this case, that the plaintiff had the right to rely upon the defendant's statement that the stock was readily selling at a dollar a share. This was a statement of fact which the testimony shows to be untrue, and it cannot be doubted that such a statement would have a material influence upon the purchaser. In *Medbury v. Watson*, 6 Mete. (Mass.) 259, an action was maintained for false and fraudulent representations as to the price paid by a third person for the property in question. In *Manning v. Albee*, supra, it was said: "In the case now before us the plaintiff offered to show that he was induced to part with his goods by the false and fraudulent representations of French and the defendant, not only as to the value of the bonds offered by French to secure the note given by him for the goods, but also as to the sales of such bonds in the market at a certain price, appearing by a published list of sales of stocks and securities, which they exhibited to him to have actually taken place. This last representation was one which the plaintiff is not shown to have had equal means of knowing the truth or untruth of, and on which he might, without imputation of negligence, rely, and, upon discovering it to be false and fraudulent, maintain an action." In *Miller v. Barber*, a representation that a patent owned by the company was of great value, and that certain other persons were owners of stock, was held to have been such a representation as the purchaser had a right to rely upon. In *Lawton v. Kittredge*, a representation that certain stock "is good property or investment, and is about to make a dividend," is held to be a false representation when untrue, and where the person taking the stock objected to receiving it on account of his doubt or ignorance as to its value. In *Bradley v. Poole*, representations that a corporate property is valuable, and one of the best properties in Colorado, when in fact the company was a bubble company, raises a question of fraud for the jury to pass upon. We think that the representation as to the market value of stock of this character is a representation of a fact which bears upon the question of the actual value, and there was no error in so instructing the jury.

But it is said that, inasmuch as the plaintiff retained this stock, and went into the employ of the company in the effort to make the stock valuable and his adventure profitable by developing the mining property, he cannot, the adventure failing, recover the value of his stock upon the ground that the representations upon which he purchased

were untrue. Undoubtedly this contention is sound if it be intended to be limited to asserting the doctrine that, after thus participating in the management of the corporation, and holding stock some months, the plaintiff would not be permitted to rescind his contract with the defendant; but that is not the nature of the present action; it is a suit upon the warranty, and, if he has shown the warranty, he has a choice of remedies, either to rescind the contract or to sue and recover damages for the breach.

2. The defendant offered testimony which tended to show that the plaintiff, in constructing a mill which was on the mining property, had not done the work well. The plaintiff, in rebuttal, was permitted to call a witness, who testified that he was acquainted with the plaintiff, and had occasion to know of his capacity and ability as a carpenter and joiner, and, against the objection of defendant, was allowed to testify that he considered him a first-class man in every respect. This was error. Testimony that the mill in question was not well constructed did not necessarily involve the question of plaintiff's capacity or ability as a carpenter or millwright.

One G. Peden testified to having seen the plaintiff intoxicated while in Arkansas. The plaintiff, in rebuttal, was permitted to introduce a certificate or recommend purporting to be signed by Peden, which was introduced and read to the jury, as follows: "To whom it may concern: Crystal Springs, Arkansas, February eighth, 1888. We, the citizens of Crystal Springs, Arkansas, having seen a letter written in Manistee, Michigan, which states that one S. W. Fowler of Manistee, Michigan, has been circulating false reports about Mr. J. D. Maxted, formerly of Manistee, Michigan, and now of Crystal Springs, Arkansas, we will say that, if Mr. Maxted has ever been discharged by the Accident Ore Mining Company, we can see no reason why, unless it was a plan set by one S. W. Fowler to beat him out of his wages, for Mr. Maxted is not a drinking man in any sense of the word, and to charge him thus is unjust and untrue. Mr. Maxted has shown himself to be a perfect gentleman ever since he has been here, and has also proved himself capable of doing any business intrusted to him; and we, as citizens of Crystal Springs, Arkansas, in justice to Mr. Maxted, will and do say that the charge against him by one S. W. Fowler is unjust." Signed, among others, by G. Peden. This paper was not shown the witness Peden on cross-examination, nor was he given any opportunity to explain it when it was offered for the purpose of contradicting his statement that he had seen Maxted intoxicated. In addition to the general objection that it was immaterial and incompe-

tent, it was objected that, even if admissible, whatever related to the drinking was all that should be read to the jury. This objection was overruled, and the letter read in evidence. On a subsequent motion the letter was stricken out because the letter of Mr. Fowler, referred to, was not produced. It would have been difficult to have framed an instrument which was better calculated to prejudice the defendant's case than was this. It was clearly not admissible, and we cannot say that it did not have its effect in prejudicing the jury against the defendant. It was a direct attack upon his character which was libelous if untrue, introduced an issue wholly foreign to the case, and which the defendant could not be expected to meet, and the fact that it was afterwards stricken out is not conclusive that the impression did not remain with the jury. It is incredible that the purpose of plaintiff's counsel could have been other than to prejudice the jury.

One other assignment of error only will be referred to. On the subject of damages the circuit judge charged the jury: "If it [the stock] was entirely worthless, as claimed here, then, if the plaintiff recovers at all, he will recover the whole amount at your hands. There can be no recoupment in this case of the defendant against the plaintiff for any claim raised upon that head. The claim cannot be sustained in this suit, for in fact there is no basis for it under the evidence." And again: "In case you find for the plaintiff, it will be for the full amount, with interest at six per cent. In case you find for the defendant, it will be, 'No cause of action.'" The proper rule for damages would be the difference between the par value of the stock as it was represented to be and what it was worth in fact, and this would have reference to the time when the stock was transferred to the plaintiff. We think the testimony in the case failed to show conclusively that the stock was absolutely of no value at the time this transfer was made, and therefore the question of its value should have been submitted to the jury. For the errors pointed out the judgment will be reversed, and a new trial ordered.

The record contains 342 pages, includes all the orders made in the case and all the testimony, which was unnecessary; and not only this, but the testimony is given precisely as it appears in the stenographer's minutes, not even omitting the certificate of the stenographer. This practice has been often condemned. We think a record of 200 pages at the most would have fairly presented all the questions which we have been called upon to consider, and the costs for printing will be limited to that number of pages. The other justices concurred.

PICARD v. McCORMICK.

(11 Mich. 68.)

Supreme Court of Michigan. Oct. Term, 1862.

H. J. Beakes, for plaintiff in error. A. Felch, for defendant in error.

CAMPBELL, J. McCormick sued Picard to recover damages on account of false representations whereby the former was induced to purchase of the latter watches and other jewelry to a large amount.

The declaration contains several different counts, and, inasmuch as it is claimed that all, or some of them, are fatally defective, it becomes necessary to refer to them.

The first count avers the ignorance of plaintiff concerning the value and quality of the articles sold, the defendant's knowledge of such ignorance, he himself being a skillful dealer in such goods, the application by defendant to McCormick to induce him to purchase, the refusal of McCormick to do so except in reliance upon Picard's representations, and a sale based on fraudulent representations of the value of the property, whereby the purchaser was damaged.

The second count is for a breach of warranty of value, by which Picard knowingly, falsely, and fraudulently deceived McCormick.

The third count is for false representations concerning the value and quantity of gold in a necklace which Picard, knowing McCormick's ignorance, induced him to purchase by such representations.

The fourth and fifth counts are framed like the first, but upon different representations.

The principal objection alleged against these several counts (which is taken on assignment of error, and not by demurrer) goes to the materiality of the frauds charged. It is claimed that an allegation of value, although false, cannot be made the ground of an action.

It is undoubtedly true that value is usually a mere matter of opinion; and that a purchaser must expect that a vendor will seek to enhance his wares, and must disregard his statements of their value. But, while this is generally the case, yet we are aware of no rule which determines arbitrarily that any class of fraudulent misrepresentations can be exempted from the consequences attached to others. Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon material statements which are knowingly false, and is thereby damaged, it can make no difference in what respect he has been deceived, if the deceit was material, and relied on. It is only because statements of value can rarely be supposed to have induced a purchase without negligence that the authorities have laid down the principle that they cannot usually avoid a bargain. But value may frequently be made by the parties themselves the principal element in a contract, and there are many cases where articles possess a standard commercial value, in which it is a chief criterion of quality among

those who are not experts. It is a matter of every-day occurrence to find various grades of manufactured articles known more generally by their prices than by any test of their quality which can be furnished by ordinary inspection. Frauds are easily committed by dishonest dealers, by confounding these grades, and cannot be detected in many cases except by persons of experience. In the case before us the alleged fraud consisted of false statements by a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's ignorance, and deliberately and designedly availed himself of it to defraud him. We think that it cannot be laid down as a matter of law that value is never a material fact, and we think the circumstances of this case illustrate the impropriety of any such rule. They show a plain and aggravated case of cheating. And it would be a deserved reproach to the law if it exempted any specific fraud from its remedial action, where a fact is stated and relied upon, whatever may be the general difficulty of defrauding by means of it. The same reasoning will dispose of the objection that in the second count the representations are not set out as having been relied upon, or as having been made in deliberate breach of confidence. If value can be regarded in any case as a material fact, then it may be made the subject of a warranty. This count is in the usual form for breach of a fraudulent warranty, and is therefore good.

An objection was also made that one of the counts averred damages less than \$100. This objection is not tenable. The counts must always be regarded in law as separate claims, and, if the aggregate damages alleged in the various counts joined exceed \$100, the court has jurisdiction.

Upon the trial, one of the witnesses, having detailed the false representations made by Picard to McCormick, concerning the watches, one of which was set with diamonds on the outside, was asked, "What was said about the jewels?" This was objected to because the declaration alleged no representation about the jewels, but the objection was overruled, and the witness swore Picard said if the watch was smashed up the diamonds would be worth \$70. The question was not improper. A declaration would be improperly framed and needlessly prolix, if it should set out in terms the whole of a conversation from which a jury would be warranted in finding that fraud had been practiced. A pleading should contain allegations of fact, and not of evidence. The inference from the evidence is one of fact, and not of law. The plaintiff was entitled, if not required, to lay before the jury the whole transaction, so that they might determine from all the facts what might not be so clear from a portion of them. The evidence was proper, therefore, as forming a part of the transaction. It was very material as tending to show a resort to circumstantial false-

hoods, which are, by common experience, more dangerous than mere wholesale assertions. There is no more effectual means of deceiving than the assertion of numerous minor facts, as evidence of a principal fact, which, if true, they would of necessity establish.

A bill of sale was produced, which the defendant endeavored to show was meant to be in the name of one Jacob Picard, and not Isaac Picard; there being some difference of opinion among the witnesses whether the initial used was meant for I or J. And, as the sale was charged as made by Isaac Picard, his counsel asked the court to charge the jury that the bill of sale was the evidence of the contract, and could not be contradicted by parol evidence. This the court refused, and told the jury that, though the contract be in writing, if the defendant had been dishonest in the transaction, the plaintiff might disregard the writing, and sue directly for the fraud. The charge was correct. The fraud is the foundation of the action. Isaac Picard, who perpetrated it, was responsible for it. If employed by some one else, it could not exonerate himself, although it might possibly render his principal liable, if guilty, civilly, and possibly as a party to a conspiracy. There was, however, nothing in the case to render such a charge material, even if it had been incorrect. The evidence showed no contract except with Isaac Picard.

A simple bill of sale does not embody the preliminaries or the essential terms of the contract in such a way as to exclude parol evidence. It is designed merely to show the transfer of title. If made in the name of J. Picard, instead of I. Picard, it was evidently a very shallow trick, although defendant seems, from his remarks to Rosenfield, to have formed the idea that, if he gave a bill of sale, there could be no after-concern about it. We are not aware of any rule which determines, in the eye of the law, any invariable distinction between the English written signs for I and J; but, if such a distinction were entirely clear, it would not have the effect of discharging a fraudulent contractor who resorted to it as a device for knavery.

Exception was also taken to the charge of the court upon the circumstances under which a vendor becomes liable for misrepresentation. We think the rule laid down remarkably clear, and entirely correct. We also think the distinction between a sale and an exchange of property was properly taken. If property is taken at a fixed money price, the transfer amounts to a sale, whether the price is paid in cash or in goods. The term "sale" is comprehensive, and embraces all transfers for a price named, whether confined to that class or not.

There is no error in the proceedings, and the judgment must be affirmed, with costs.

The other justices concurred.

PECK v. JENISON et al.

(58 N. W. 312, 99 Mich. 326.)

Supreme Court of Michigan. March 20, 1894.

Error to circuit court, Kent county; Allen C. Adsit, Judge.

Action by Arthur R. Peck against Luman Jenison and another for the price of goods sold and delivered. There was judgment for defendants, and plaintiff brings error. Affirmed.

D. E. Corbitt, for appellant. W. W. Mitchell, for appellees.

LONG, J. Plaintiff resides at Syracuse, N. Y., and is the manufacturer of a machine called the "Peck Autographic Cash Register." He has a general agent in this state for the sale of the machines, and the general agent also has agents taking orders for sales. Some time in March, 1893, Mr. Forte, one of these subagents, called upon the defendants, who keep a country store in Ottawa county, and procured from them the following order: "A. R. Peck, Cortland, N. Y. Please ship to us to Jenison, Mich., one Peck's cash register, same as sample shown. Cabinet to be oak No. 5, three rolls of paper. On fulfillment of the above, we agree to pay you forty-five dollars (\$45.00) as follows: Five days after shipment you to draw at one day's sight, deducting 5 p. c. from purchase price. Register to be delivered f. o. b. Cortland, N. Y., in good working condition, and equal in every respect as sample shown. All paper rolls used to be purchased of A. R. Peck, the cost not to exceed twenty-five cents per roll for No. 3, and thirty-five cents for No. 5, and in quantity not less than four rolls at one time. In default of any payment, you or your agent may take possession and remove said cash register without legal process, and all claims for damages arising from such removal are hereby waived. This order is given subject to your approval, and it is expressly agreed that it shall not be countermanded. Should there be any failures to accept such drafts or execute notes for deferred payments on presentation of same, it is agreed that the entire purchase price shall at once become due and payable. In default of any one acceptance or note, it is agreed that all the remaining acceptances or notes shall at once become due and payable, notwithstanding anything in the acceptances or notes to the contrary. All claims for verbal agreements not embodied herein are waived. It is expressly agreed that the title of said cash register shall not pass until paid for in full. Should the register get out of order within two years from date sold, you to repair the same gratis, the undersigned paying the express charges to and from the factory. Yours, truly, L. & L. Jenison." The machine was left with the defendants, who

kept it for a time, and then shipped it to the plaintiff. This suit was brought to recover the value of the machine. The defense set up was that the contract or order for the machine was obtained by false and fraudulent representations. The representations made by the agent who took the order were that the machine was the best and cheapest cash register that could be bought, that it was worth the price, and that it was the only one that could be bought on the market for that price, and that, if the defendants did not find it as he represented, they could return it. Defendants knew nothing of the quality or practical workings of such machines, and told the agent that they would take it wholly upon his representations. The price was to be \$45. The representations were made by the authority of the general agent in this state for the plaintiff, and he testified that he instructed the subagent who made the sale to represent to the parties purchasing that the machine was actually worth \$45, and that that was the only one which could be bought for that price; and that if they would take it and try it, and it was not as represented, they might send it back. It was shown that a machine of equal value was at that time selling in the market for \$20, and also that this machine was not worth to exceed \$5. The court directed the jury substantially that if they found that these representations were made, and defendants relied upon them in signing the order, and that they were untrue, that the defendants had a right to return the machine and rescind the contract. The jury returned a verdict for defendants.

It is contended by counsel for plaintiff that the court was in error in these instructions on the grounds: (1) Because the contract provided that the order should not be countermanded, and also that "all claims for verbal agreements not embodied herein are waived." It is said that the testimony given, and the instructions of the court thereunder, changed the terms of the written contract, and therefore the testimony was not admissible, and the charge of the court was erroneous. The testimony was not offered or received for this purpose, and the court did not submit the question to the jury upon that theory. The claim was that the order was procured by fraud, and, if so, the defendants would have the right to rescind on that ground; but it is claimed: (2) That the testimony did not tend to establish that fact; that the representations as to the value of the machine were but the expression of an opinion; and that a vendor has the right to praise his goods in order to make a sale, and the statement of the value is no more than the expression of an opinion. This is undoubtedly the general rule, but in the present case it appears that the defendants knew nothing of its value, and signed the order relying wholly upon the statement of the agent. It was

the statement of a fact which the agent knew to be false. The case falls so squarely within the rule laid down in *Picard v. McCormick*, 11 Mich. 68, and *Maxted v. Fowler*, 94 Mich. 163, 53 N. W. 921, that further suggestions are quite unnecessary. The judgment must be affirmed.

HOOVER, J., did not sit. The other justices concurred.

TOTTEN v. BURHANS.

(51 N. W. 1119, 91 Mich. 495.)

Supreme Court of Michigan. May 6, 1892.

Error to circuit court, Shiawassee county; William Newton, Judge.

Trespass on the case by Frank M. Totten against Daniel Burhans. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Watson & Chapman, for appellant. S. F. Smith and G. R. Lyon, for appellee.

MORSE, C. J. The plaintiff commenced suit in the circuit court for the county of Shiawassee against the defendant in trespass on the case, claiming damages for fraud, and recovered verdict and judgment for \$1,237.50. Totten on the 4th day of February, 1889, bought out the interest of Burhans in the Owosso Cigar & Candy Company, a copartnership doing business at Owosso. Adelbert Chase at the time of this purchase was a partner with Burhans, and after the sale continued as a partner of Totten. Chase had but little money in the concern, but traveled for the firm, and it would seem put his services and experience against the money of Totten, as the record shows, from plaintiff's testimony, as well as other evidence, that he was an equal partner in the profits of the business. The declaration alleged the fraud to have consisted in the representations of Burhans that the business of said Owosso Cigar & Candy Company, for a long time prior to said sale of his interest to plaintiff, had been "a good, profitable, paying, and remunerative business," and that Burhans and Chase had realized, and were then receiving, large profits from such business, and that said plaintiff could not fail to receive \$2,000 net profits per year from such business. And that certain accounts and demands belonging to said company against divers persons, customers of said company, amounting to the sum of \$7,000, purchased by said plaintiff with said business, were good and collectible, and actually owing to said firm or company; that they would be paid promptly, and were all and each of them worth their face value, dollar for dollar. The declaration further alleged the falsity of these representations, and that, by means of the premises, the defendant defrauded the plaintiff, so that he not only lost the money he paid to purchase defendant's interest, to wit, \$2,000, but was deprived of his good and fair reputation as a business man, and was damaged by the loss of the accounts not collectible and his labor and services for one year. The testimony shows that Totten paid \$2,000 down, which was about the value of the Burhans interest in the stock on hand, received from Burhans between \$6,000 and \$7,000 worth of accounts, and agreed to and did assume the old indebtedness of the firm to about the

sum of \$7,000. After running the business about a year, plaintiff sold out to Burhans, to whom the firm was indebted for indorsements, losing his \$2,000, and being indebted besides in a large sum of money on account of the business, which had proven unprofitable under his management. The court instructed the jury that the only damages that the plaintiff could recover would be the difference between the accounts turned out to him as good, worth dollar for dollar, and what they were actually worth, with 6 per cent. interest from date of commencement of suit. Under the declaration in the case, and the facts as shown by the plaintiff's own testimony, the only fraud he could legally complain of was in relation to these accounts. The evidence failed to show that the business was unprofitable before he purchased defendant's interest, and the court rightly held that he could not recover for injury to his business reputation. For his \$2,000 he received an equivalent in the goods on hand.

It follows, therefore, that the evidence in the case should have been confined to the matter of these accounts, whether they were good and collectible, worth a hundred cents on the dollar at the time plaintiff purchased them, what amount of them were collected by the plaintiff, and whether or not the balance could have been collected by due diligence on the part of plaintiff. But the inquiry went outside of this plain issue, against the repeated objections of defendant's counsel. It was error to permit plaintiff to show how he conducted the business after he purchased Burhans' interest, and Burhans' connection with such business, except in so far as the collection of these accounts was concerned. Also that Burhans had his office in the building, and that defendant counseled with him in the management of the business.

The sale of the business back again to Burhans, and the details of such transaction, had no legitimate place in the case, and no bearing upon any proper issue in it. The admission of this testimony, which forms a principal part of the record before us, was evidently prejudicial to defendant.

It is claimed that there was no evidence tending to show that any of the accounts purchased by plaintiff were not good and collectible, but, as all of the testimony in the case is not returned, we are not able to say that the court below erred in not directing a verdict for the defendant. The fact that all the testimony, or the substance of it, is not returned upon any particular subject, disposes also of the claim made in this court,—the record is silent as to its being made in the court below,—that one half of these accounts belonged to Chase, and that plaintiff was allowed to recover the full amount of them. There is some testimony tending to show that Totten had bought out Chase before the resale to Burhans, and also that

Chase had but a nominal interest in the partnership. There was no error in the charge of the circuit judge.

The rule of law is well settled in this state since the case of *Holcomb v. Noble*, 69 Mich. 296, 37 N. W. 497, that it is immaterial whether a false representation is made innocently or fraudulently, if, by its means, the plaintiff is injured. Therefore it made no difference in this case whether Burhans knew

that any of these accounts were not good, or supposed them to be all good. If, in fact, any of them were not good, and plaintiff lost money thereby, then there was a legal fraud, for which defendant was responsible. And if any of the accounts so purchased by plaintiff had been paid, the defendant must make them good. The judgment is reversed, and new trial granted, with costs of this court to defendant. The other justices concurred.

HENRY v. VLIET et al.

(54 N. W. 122, 36 Neb. 138.)

Supreme Court of Nebraska. Jan. 18, 1893.

On rehearing.

MAXWELL, C. J. This is an action of replevin to recover the possession of 60 barrels of 74 gasoline, 750 cases 100 flash oil, 300 cases 2-5 150 W. W. oil, of great value. The answer of the defendant below (plaintiff in error) was a general denial. On the trial of the cause the jury returned a verdict in favor of the defendants in error for the property in dispute, and "that the defendant is indebted to the plaintiffs in the sum of \$757.52 for goods not found." Judgment was rendered on the verdict.

The substantial facts in the case are as follows: One L. A. Stewart, doing business in Omaha as L. A. Stewart & Co., during the months of April, May, June, and July, 1887, seems to have purchased goods from every one who would sell to him on credit. He seems to have had but little property, and less integrity. Early in July of that year he purchased from the plaintiff below four car loads of oil, which were to be paid for in cash on delivery, or by a secured note or draft accepted by some bank. Upon the arrival of the property he managed to obtain possession of the same without either paying the cash or giving a secured note. He thereupon executed a chattel mortgage on the same, together with other property, to Henry, to secure the payment of one note for \$5,000, dated April 30, 1887, due 90 days from the date thereof; one note for \$5,000, dated June 10, 1887, due in 90 days from the date thereof; one note for \$2,500, dated June 25, 1887, due in 90 days from the date thereof; and one note for \$2,500, dated June 22, 1887, due 90 days from the date thereof; and also three certain drafts drawn by L. A. Stewart & Co. on W. R. Stewart, of Des Moines, Iowa, in the aggregate sum of \$4,957.50. The notes described in said mortgage (with the exception of one for \$2,500, dated June 25, 1887,) were renewals of prior indebtedness, \$10,000, which was first loaned January 2, 1886. The bills of exchange secured by said chattel mortgage consisted of one draft drawn July 19, 1887, upon Will R. Stewart, Jr., of Des Moines, Iowa, for \$850; one draft for \$2,617.50, dated July 20, 1887, upon Will R. Stewart, Jr.; one draft upon W. R. Stewart, Jr., for \$1,490, dated July 21, 1887,—all of which said drafts were protested for nonacceptance. Said drafts were deposited in the Bank of Omaha, of which Andrew Henry was the sole owner, and received as cash, and L. A. Stewart & Co. were allowed to draw against them as so much cash on deposit. At the time of the giving of said mortgage there was in the Bank of Omaha to the credit of L. A. Stewart

& Co. the sum of \$274.50. The notes secured by said mortgage were all signed by L. A. Stewart & Co. and also by W. R. Stewart, Jr. It had been the custom of W. R. Stewart, Jr., to honor the drafts of L. A. Stewart & Co. upon him. It also appears that on July 20, 1887, W. R. Stewart, Jr., of Des Moines, Iowa, accompanied by his attorney, Mr. Dudley, came to Omaha, and insisted upon L. A. Stewart & Co. securing the indebtedness to the Bank of Omaha upon which W. R. Stewart, Jr., was liable as surety. A mortgage was thereupon prepared by L. A. Stewart & Co. conveying the stock of goods and accounts of the said L. A. Stewart & Co., including the goods in controversy in this action; and W. R. Morris, attorney for L. A. Stewart & Co., W. R. Stewart, Jr., and his attorney, Mr. Dudley, on the morning of the 22d of July, 1887, presented the same to Henry, and demanded that, in consideration of the entire indebtedness to said Andrew Henry being secured, the said Andrew Henry should release the said W. R. Stewart, Jr., from liability by reason of said notes. The mortgage was thereupon received by Henry. There is a conflict of testimony on this point; the evidence of W. R. Morris and W. R. Stewart, Jr., being that said W. R. Stewart, Jr., was absolutely released from his liability upon said notes; and the testimony of Edward J. Cornish was that Andrew Henry agreed, as part consideration of said mortgage, not to press W. R. Stewart, Jr., upon the notes, or to bring suit or in any manner to make claim for payment upon the notes until the mortgaged property should be entirely exhausted; and this we are convinced is the truth in regard to the transaction. W. R. Stewart, Jr., therefore, is still liable on those obligations. It is unnecessary for us to review the various assignments of error at length.

The conceded facts show that the property in question was sold for cash on receipt or secured notes; that Stewart obtained the property without paying for it; that he soon afterwards executed the mortgage in question; that Henry knew, or had the means of knowing, that the property in question had not been paid for, and in no sense is he a bona fide purchaser. The same is true of W. R. Stewart, Jr. As against these parties, therefore, the owner of the goods had a right to reclaim them. Some reflections are made upon the plaintiff in error in the defendants in error's brief, but there is no ground for such insinuations, as he seems to have done nothing inconsistent with fairness and integrity; but the claims of the defendants in error are superior to his. It follows that the judgment is right, and that the opinion in this case on the former hearing, which is reported in 33 Neb. 130, 49 N. W. Rep. 1107, should be overruled. The judgment of the district court is affirmed. The other judges concur.

POTTER et al. v. LEE.

(53 N. W. 1047, 94 Mich. 140.)

Supreme Court of Michigan, Dec. 22, 1892.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action by George N. Potter and others, co-partners, as the Potterfield Cheese Factory, against Gilbert W. Lee, to recover the value of cheese sold defendant. From a judgment for plaintiffs, defendant appeals. Affirmed.

Charles W. Casgrain and Charles S. McDonald, for appellant. Philip T. Van Zile and Frank E. Robson, for appellees.

LONG, J. Plaintiffs brought assumpsit in the Wayne circuit court on the common counts. In their bill of particulars they claimed for the price and value of 169 cheeses, weighing 7,253 pounds, at 7½ cents per pound, amounting to \$543.98. Defendant gave notice under his plea of the general issue that the plaintiffs falsely and fraudulently represented that the cheeses were good and merchantable, were not strong, and would not crumble when cut; that between 18 and 20 only were made during the month of July, and the balance were made during August of that year, and that the entire lot was equal, if not superior, to the samples which were exhibited; that he (the defendant) relied upon such warranty in making the purchase; that the same were not equal to the samples, and that such representations were false, and the cheeses were of an inferior quality; were made from inferior ingredients; were strong, and would crumble when cut; were unmerchantable, and of no value; and that he sustained loss thereon, and to his business, etc., which he would recoup on the trial. The case was tried before a jury, and the plaintiffs had verdict and judgment for \$585.66. Defendant brings error. On the trial the plaintiffs produced as a witness John Potter, who was the agent of the plaintiffs in making the sale to the defendant. His version of the sale and what the contract was is that on the 24th day of September, 1890, he called upon the defendant at his place of business in Detroit, and endeavored to sell him a quantity of cheese, which he had at the Detroit, Grand Haven & Milwaukee depot in Detroit. He did not sell them on the first visit to defendant. He called upon others, and on the next day made a sale to the defendant. He took 15 cheeses as samples to defendant's store. Three or four were taken into the store, and examined by the defendant with a trier. Defendant asked what he wanted for them, and he said 8 cents. Defendant would not pay that price, and offered 7½ cents, and the bargain was closed at that price. The cheeses were each marked plainly on the outside with the date they were made. Mr. Potter testified that no representations were made as to the cheeses being good and marketable, or that those at the depot were as good as the samples, but that he stated that they were made in July and August. He also

testified that in selecting the samples he took some of July and some of August make, and without an effort to select the best. The defendant testified that he tried three of the cheeses with a trier, and found them good. He asked how many of the whole lot were made in July, and Potter answered 15 or 20, and the rest in August. After examining the three, he asked Potter if the cheese would crumble when cut; if they would, he would not give a cent per pound. Potter said other merchants at Potterfield had used them with perfect satisfaction. That he then said to Potter: "If that lot of cheese is as you represent it, and will not crumble, and are as good as these three samples I will take it all, and pay you seven and a half cents per pound for it." Potter said he would take that price, and wanted a check for the amount. I told him: "That may be all right; we have plenty of money to pay it, but we don't pay quite as prompt as that. You are a stranger to me, and I have seen only ten boxes of these cheese, and I don't know what is in the ear. If in the course of ten days we find this cheese as you represent it, we will pay for them, taking one per cent., which is customary." Mr. Potter then left for home." The last part of this arrangement is substantially agreed to by Mr. Potter. He says that defendant wanted 1 per cent. off, or take 30 days to pay it in, and he gave him the 30-days time. Nothing has ever been paid. Defendant took the cheeses from the depot, sold some, and says that in less than 10 days parties to whom he shipped some of them refused to pay, and wrote letters rejecting them. He introduced testimony tending to show that he attempted to make sales; that the cheeses would crumble when cut, and come back upon his hands, as they were not equal to the sample; and that it had injured his business to a great extent. He testified further that he wrote a letter to the plaintiffs on October 21st, which was the first notification he gave them of the quality or condition of the cheeses, and the first refusal to pay for them. He states in his letter that the 15 cheeses shown as samples were readily sold, and that no fault was found with them; but claim is made that some 46 were shipped to Mr. Clemens, and all but 5 or 6 returned; that others were afterwards returned by parties to whom he had shipped them. Plaintiffs were asked to take the balance away. Much testimony was given which it is not necessary to allude to. The errors relied upon relate principally to the refusal of the court to give certain of defendant's requests to charge, and to the charge as given. Claim is also made that the court was in error in refusing to permit the defendant to show the loss of profits on resale caused by breach of warranty, and the effect such breach had upon his business and trade. The court charged the jury that if they found the defendant remained silent for some 26 days after the cheeses were purchased, without complaining that those delivered were not such in quality

as those purchased, and if they found that cheeses were perishable property, defendant could not, after that lapse of time, rescind his contract; and their verdict must be for the plaintiffs for the price the cheeses were sold for; and, further, the court directed the jury that the failure to notify the plaintiffs must be considered as an acceptance of the property at the price agreed upon.

We need not state the several requests to charge, as, from the view we take of the case, the court, under the testimony of the defendant himself, should have directed the verdict in favor of the plaintiffs. Defendant admits that he said to Mr. Potter, plaintiffs' agent: "You are a stranger to me, and I have seen only ten boxes of these cheese, and I don't know what is in the car. If in the course of ten days we find this cheese as you represent it, we will pay for them." The arrangement, in effect, was that he was to have 10 days to examine the cheeses, and if found as represented, he was to pay for them; and, if not found as represented, he might return them. Potter does not dispute this arrangement. It is therefore evident, even if a warranty was made by Potter as to the quality of the cheese in the car, and not examined at the time by the defendant, that the defendant did not rely upon it, but preferred to make an examination for himself, and was to have the 10 days to do it in. If he did not make such examination, it was his own fault. He says the cheeses were brought to his store. He had therefore every opportunity to make an examination. He was told by Mr. Potter that they were made in July and August, but claims that Potter told him that only 15 or 20 were made in July, and the rest in August. When they were brought to the store, he could readily see what quantity was made in each month from the marks upon the boxes. He claims

that complaint was made of some that he sold even before the 10 days elapsed, and yet he gave the plaintiffs no notice of these facts for 26 days after the purchase, knowing, as it is shown, that the cheeses were perishable property. He continued selling right along after the 10 days elapsed and up to the time he finally refused payment. It appears that there was no contract of warranty upon which he relied, but rather an agreement for 10 days' time to examine and determine whether or not he would keep them. He failed to return them within the 10 days, and, under the admitted facts, he must be considered as having accepted them, and cannot be heard to set up the defense of warranty and breach. *Farrington v. Smith*, 77 Mich. 550, 43 N. W. 927; *Childs v. O'Donnell*, 84 Mich. 533, 47 N. W. 1108; *Manufacturing Co. v. Bangs* (Minn.) 44 N. W. 671; *Rosenfield v. Swenson* (Minn.) 47 N. W. 718. In *Reed v. Randall*, 29 N. Y. 363, the court, in speaking of an article found to be unmerchantable, said: "The latter [the vendee] is not bound to receive and pay for a thing that he has not agreed to purchase; but, if the thing purchased is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality." In the present case, the defendant admits that he had some of the cheese returned within 10 days after its purchase, yet he kept on selling for 16 days thereafter, without notice to the seller. In this view of the case, whatever technical errors may have been committed on the trial are of no importance, as the right result has been reached. Judgment is affirmed, with costs. The other justices concurred.

WILSON v. NEW UNITED STATES CATTLE-RANCH CO., Limited.

(20 C. C. A. 244, 73 Fed. 394.)

Circuit Court of Appeals, Eighth Circuit,
March 30, 1896.

In error to the circuit court of the United States for the district of Colorado.

At some time in the early part of 1884 the New United States Cattle-Ranch Company, Limited, a corporation, and the defendant in error herein, agreed to purchase of William J. Wilson, the plaintiff in error, the Circle ranch, which was located on the Republican river and some of its tributaries in the states of Nebraska, Colorado, and Kansas, and 6,000 head of cattle grazing thereon, and to pay therefor about \$300,000 in money and some stock of the corporation. By this contract, and its various modifications, the plaintiff in error covenanted to convey to the vendee a good title to 3,000 acres of land, and to deliver to it 6,000 head of cattle. The vendee paid \$63,850 of the purchase price, took possession of the ranch and of some of the cattle, and gave a bond and mortgages upon the cattle and the land to secure the payment of the balance of the price. The vendor made a bill of sale of the cattle, and a deed of 453.80 acres of the land to the vendee, and also gave to it a bond to convey a good title to the remainder of the 3,000 acres of land. All these papers were deposited with a bank in the city of Denver, to be delivered to the vendee if it paid the balance of the purchase price according to their terms, and to be delivered to the vendor if the vendee failed so to do. It was also agreed that the moneys realized from the sales of the cattle meanwhile should be applied in part payment of the purchase price. On the 22d day of July, 1885, the vendor entered upon this ranch, took possession of the cattle and personal property thereon, and in the month of September sold them under the chattel mortgage given by the vendee for a default in the payment of an overdue installment of the purchase price. Thereupon the cattle company brought an action against the plaintiff in error in the court below for \$250,000. It alleged in its complaint that the plaintiff in error had by false and fraudulent representations as to the number and character of the cattle, and as to his title to the 3,000 acres of land, and as to the quantity of other land to which he had the right of possession, and as to the previous sales of cattle from this ranch, and as to various other matters connected with the transaction, induced it to make the contract of purchase and the various modifications thereof, and to pay that portion of the purchase price which it had paid. It also alleged that the plaintiff in error had made covenants which he had not kept, and warranties which he had broken. After setting forth these various false representations, which the defendant in error averred had induced it to make the contract

of purchase, and the various covenants and warranties which it alleged the plaintiff in error had made and broken, it closed the statement of its cause of action with these two allegations: First, it alleged that it did not ascertain until after the 19th day of September, 1885, on which day the personal property was sold under the chattel mortgage, the frauds and tricks practiced upon it by the vendor in counting and delivering the cattle, and that immediately thereafter, on account of shortages and violations of the agreement, on account of the substantial failure of the vendor to carry out his contract, on account of the entire failure of said transaction, and on account of the deceit and fraud of the defendant, and the failure of the consideration which induced it to enter into the contract, it renounced the said contract of purchase, and demanded repayment of the moneys it had laid out and expended, which, it alleged, amounted to \$250,000; second, it alleged that, at all times after the making of the contract and of the modifications thereof, it had been willing and had offered to carry out and perform its part thereof, upon the performance by the plaintiff in error of his promises and undertakings contained therein, but that he had utterly failed and neglected to perform the contract on his part, so that the considerations which induced the plaintiff to enter into it had utterly failed, and the objects and purposes to be attained thereby were completely destroyed, and great loss and damage was inflicted upon it by the fraud and deceit of the defendant, and by his failure to perform his contracts and undertakings, and to make good his representations and statements. These allegations are followed in the complaint by a prayer for \$250,000, and interest from September 19, 1885. Issues were joined upon the averments of this complaint, and upon their trial the jury returned a verdict against the plaintiff in error for \$50,000. It is the judgment upon this verdict that is attacked by this writ of error.

Chas. S. Thomas (W. H. Bryant was with him on the brief), for plaintiff in error. Chas. J. Hughes, Jr. (Tyson S. Dines was with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The futile attempt of the defendant in error to maintain an action for affirmance, and an action for rescission of its contract of purchase, upon the facts pleaded in its complaint, has resulted in such inextricable confusion of the rules of law applicable to the trial of this case that the judgment below must be reversed. When a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a

choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, and recover the damages he has sustained by the fraud. He cannot, however, do both. It is as difficult a feat to maintain a cause of action for the consideration paid for the purchase on the ground of rescission, and one for damages for the fraud which induced it, and for a breach of the contract of purchase itself, in the same action, as it is to ride at the same time two horses that are traveling in opposite directions. Upon a rescission of a contract of purchase, the measure of damages is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered. Upon an action for damages for the deceit and fraud which induced the purchase, the measure of damages is what the vendee has lost. It is the difference between that which he had before, and that which he had after, the contract of purchase was made. *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39; *Reynolds v. Franklin*, 44 Minn. 30, 46 N. W. 139. Upon an action for a breach of the covenants and warranties contained in the contract of purchase, the measure of damages is the difference in value between the property actually received, and its value as it would have been if the warranties and covenants had not been broken. The two causes of action last mentioned are consistent with each other, and may be maintained together; but each of them is inconsistent with the cause of action for rescission, and neither of them can be maintained at the same time with that cause of action. One who has been induced by fraud to make a disadvantageous contract of purchase may affirm the contract, and sue for its breach by the vendor, and at the same time may recover of him the damages which resulted from the fraud which induced the contract; but he cannot recover for a breach of the contract, and for the fraud which induced it, and at the same time recover the consideration which he paid for it. He cannot have the benefit of the contract which he purchased with the consideration, and also have the consideration itself. The court below perceived this dilemma, and, in opening its charge to the jury, it told them that the defendant in error sought to recover on either of three grounds: First, on the ground of deceit; second, on the ground of a breach of express warranties; and, third, on the ground of a rescission of the contract,—but that they need not consider the latter ground, except to ascertain whether or not the whole consideration to the plaintiff failed on account of the fraudulent acts and practices of the defendant. The court then attempted to keep these three grounds of recovery distinct, and it charged the jury that, if they found that the contract and its modifications were induced by deceit, the defendant in error might recover the proper

measure of damages for that fraud, and that if they found no deceit, but found that there was a breach of express warranties, the defendant in error might recover damages on that ground, and that if there was an entire failure of consideration, as there would be in case of rescission, the defendant in error might recover all its expenditures on account of the contract. This attempt, however, proved futile. The different measures of damages applicable to the three causes of action became inextricably confused before the charge closed; and the court advised the jury, among other things, that if they found that through the failure of the plaintiff in error to fulfill his warranties, and the retaking of the property by the plaintiff in error under his chattel mortgage, there was an entire failure of consideration to the vendee, they might give to the cattle company a verdict for the moneys it had paid to the vendor with interest from September 19, 1885, and for all the expenses it had paid on account of the purchase. In other words, the court charged that the jury might give the same damages for the breach of the warranties in the contract that they might have given in case of the rescission of the contract. If we apply this portion of the charge of the court to a single warranty, its error is apparent. One of the guaranties contained in the contract was that there were 6,000 cattle on the ranch, and that the vendor would gather and deliver to the vendee 5,400 cattle of all ages during the season of 1884. The breach of this guaranty alleged in the complaint was that there were not more than 3,000 cattle in the herd at the time the contract was made, and that the vendor did not deliver during the season of 1884 more than 4,000 cattle of all ages. It is obvious that the measure of damages for this breach was the difference in value between the herd as it was and as it was warranted to be, and not the consideration paid for, nor the expenses paid on account of, the contract. Nor could the fact that the vendor some months later seized the cattle then upon the ranch, under an alleged default in the mortgage given to secure the payment of the balance of the purchase money, change the measure of damages upon the warranties, or substitute for it the measure of recovery allowed upon a rescission of the contract.

The court fell into another error in its treatment of the warranties alleged in the complaint. It charged the jury as follows:

"You may take into consideration all the facts and circumstances, in determining what, if any, warranties defendant made, or caused to be made; statements made by the defendant, or caused to be made, if any, by him, not made as mere matters of opinion or belief, but affirmations of existing facts as facts, for the purpose of assuring the plaintiff or its agents, or both, of the truth of the facts affirmed, and inducing the plaintiff to make the purchase of the ranch and property

in question; and such statements, if any, relied on by the plaintiff and its agents, or either, in making said purchase, or entering into said contract, or acting in respect thereto, may authorize you in finding an express warranty, if you think it ought to be found from the evidence and all the circumstances of the case."

Again, it charged the jury with reference to a representation that there were 800 beef cattle in the herd, which was made before any of the written contracts were signed, as follows:

"The court charges the jury that if they find from the evidence that it was represented by the said defendant, or his agent, that there were in said herd eight hundred beef cattle ready for the market, that this was a material representation, for the truth of which the said defendant was responsible, and that, if said cattle were not there as represented, then the said plaintiff had a right to a deduction from the contract price, and from the first payment thereon of the value of the cattle which were not there according to said representation, and the said defendant was under obligation to make reduction therefor; and this although there may be no special mention or reference in the contract itself to the number of the said cattle, for the reason that the said plaintiff had a right to rely upon the statement and declaration and representation made by and for the said defendant as to their existence and presence in said herd."

These portions of the charge were erroneous and misleading in the case now before us. It may be that some portions of them could be sustained in a case in which the parties to the sale had not reduced their contracts to writing, but they were certainly not applicable to the case at bar. The parties to this suit embodied their agreement of sale in a written contract, and signed it. So careful were they that there should be no question what their contracts were and what they were not, that they reduced to writing and signed no less than five agreements of modification of their original contract. In these various agreements the vendor made certain express warranties. He guaranteed that the herd sold should consist of 6,000 cattle which should be well graded American stock, free from Texas or Spanish pedigree, and should include 30 full-blood Durham bulls; that he would deliver all these cattle by the close of the round-up season of 1885; and that he would deliver 5,400 cattle of all ages during the season of 1884. But he nowhere in these contracts guaranteed or agreed that there were 800 beef cattle in this herd, or that he would deliver any such cattle to the purchaser. The defendant in error made no plea of any mistake in the draft of these contracts. It made no demand for any change or reformation of any of them. From these facts the legal inference irre-

sistibly follows that all prior representations, statements, and declarations made in good faith, and all prior oral contracts, were merged in these written agreements, and that they contained all the warranties and guaranties that the parties to these negotiations made. They contained some warranties. The conclusion is irresistible that when they were made the parties selected from their oral representations those declarations, and all those declarations, which they agreed to warrant or guaranty, and embodied them in these written agreements. "*Expressio unius est exclusio alterius*." In the absence of fraud or mistake in reducing complete contracts of sale, containing warranties, to writing, the presumption is conclusive that they contain all the warranties that the parties intended to make or did make. The supreme court of Minnesota states the rule thus:

"Where the parties have deliberately put their engagements into writing, in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking, was reduced to writing." *Thompson v. Libby*, 34 Minn. 374, 377, 26 N. W. 1; 1 Greenl. Ev. § 275; *Barnes v. Railway Co.*, 12 U. S. App. 1, 7, 4 C. C. A. 199, and 54 Fed. 87; *McMurphy v. Walker*, 20 Minn. 382, 386 (Gil. 334); *Harmon v. Harmon*, 51 Fed. 113, 115.

The result is that the plaintiff in error was not liable for the breach of any guaranties or warranties not found in his written contracts, and it was error for the court to instruct the jury that they might find that any statements of facts which he made to induce, and which did induce, the contract of sale, were express warranties, for whose breach he was liable. Moreover, if the plaintiff in error had warranted that there were 800 beef cattle in the herd sold, and there were in fact no such cattle there, the measure of damages for the breach of this warranty would not have been the value of 800 beef cattle. It is conceded that there were more than 800 cattle in the herd, and the measure of damages for the breach of a contract that 800 of them were beef cattle could not be more than the difference between the value of 800 beef cattle, and the value of 800 of the best cattle found in the herd. The defendant in error had a written guaranty of the number of the cattle in the herd, for the breach of which it was entitled to recover the difference between the value of the number of cattle actually there, and the value of the 6,000 cattle guaranteed to be there. If, in addition to these damages, it could also recover the value of the 800 beef cattle, the plaintiff in error would, in effect, be required to furnish the equivalent of 6,000 cattle guaranteed in his written contract plus 800 beef

cattle, or in all 6,800 cattle, and that was not the contract.

There are many other assignments of error in this case. Those which we have noticed present basic questions that will return for consideration upon the second trial. Many of those raised by the other assignments present minor questions that may not arise again, and it would serve no good purpose to extend this opinion by noticing them.

The fundamental principles which must govern this case are: One who is induced to make a disadvantageous contract of purchase by the fraudulent misrepresentations of his vendor has a choice of remedies. He may, upon the discovery of the fraud, rescind the contract, restore what he has received, and recover what he has paid, or he may enforce the contract, and recover the damages caused by the fraud which induced him to make it, but he cannot do both. If he chooses the latter remedy he may recover, for the fraud which induced

the contract, the difference between the value of what he had before he made the contract, and the value of what he would have had after the contract was made, if it had been duly performed by both parties to it. In addition to these damages, if the vendor has unlawfully failed to perform his part of the contract and to keep his warranties, the vendee may recover, as damages for such breaches, the difference between the value of the property actually received, less that portion of the purchase price secured to the vendor by the mortgage back upon it, and the value which the property would have had, less that portion of the purchase price secured to the vendor by the mortgage back upon it, if the contract had been duly performed. A careful application of these rules will, we think, result in an impartial trial of this case. The judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial, and it is so ordered.

LUKENS v. AIKEN.

(34 Atl. 575, 174 Pa. St. 152.)

Supreme Court of Pennsylvania. March 2, 1896.

Appeal from court of common pleas, Chester county; W. B. Waddell, Judge.

Action by George W. Lukens against John Aiken. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Harris, for appellant. Thomas W. Pierce and George B. Johnson, for appellee.

WILLIAMS, J. This appeal depends upon the correctness of the rule given by the learned judge of the court below to the jury upon the measure of damages to which the defendant was entitled. The action was upon a note given by the defendant for a balance of purchase money due to the plaintiff for machinery bought of him. The defense was that the purchase of the machinery was induced by false representations made by the plaintiff as to the character, effectiveness, and state of repair of the machinery at the time of sale. Evidence was given upon the trial tending to show that false representations were made to the defendant, and that he had expended some money and lost some

time in the effort to put the machinery in good working condition, with, however, but indifferent success. Upon this state of the evidence he asked the court to tell the jury that he was entitled not only to defeat a recovery upon the note, but also to recover back all the purchase money previously paid, all the expenses incurred, and compensation for all time lost, without having rescinded the contract or returned the machinery. This the learned judge declined to do, but instructed the jury that one who had been imposed upon or misled by false and fraudulent representations must elect which of two courses of conduct he would pursue. He had the right to rescind the contract, return the articles purchased, and demand the return to himself of the purchase money; or he could retain the property purchased and defend against the purchase money, or recover in an action for the deceit the difference between the value of the goods as represented or warranted, and their actual value at the time of the sale. This was a correct statement of the law applicable to the facts alleged by the defendant, and we see no reason for complaint on his part. The assignment of error which embodies this instruction is overruled, and the judgment is affirmed.

CORTLAND MANUF'G CO., Limited, v.
PLATT et al.

(47 N. W. 330, 83 Mich. 419.)

Supreme Court of Michigan. Nov. 5, 1890.

Error to circuit court, Berrien county;
Thomas O'Hara, Judge.

G. M. Valentine and S. Tryon, for appellants. Geo. S. Clapp, A. Plummer, N. A. Hamilton, and L. C. Fyfe, for appellee.

CHAMPLIN, C. J. Plaintiff brought replevin for certain wagons, poles, and seats. The defendant George W. Platt had, prior to February 3, 1889, been engaged in the mercantile business at Benton Harbor, the principal line of his business being hardware. He was also interested in the milling business at that place. He was assisted in his store by his son, Frank H. Platt, who, during his father's absence, or inability to attend to business, on account of sickness, exercised full control over the business. In 1887, George W. Platt drew money out of his hardware business to invest in the milling business; and, to meet a bank-note and bills maturing on August 7, 1887, he borrowed \$3,000 of the Bank of Benton Harbor, and gave security, by way of a chattel mortgage, upon his stock of hardware. This mortgage was, by mutual consent, not placed upon file, and in December, 1887, this debt had all been paid except \$900, for which the bank took three notes, of \$300, \$100, and \$500, respectively. On January 27, 1888, there was due on this mortgage the principal sum of \$600, and on that day, unknown to Platt, the mortgage was placed on file. On February 2, 1888, the mortgage was paid in full and discharged. The filing of the mortgage caused inquiries to be made by the creditors of Platt, who was then sick; and his son, Frank H., without the knowledge of his father, prepared, and on the 10th day of February, 1888, gave to the collecting agency of R. G. Dun & Co., a statement of the financial standing of George W. Platt on the 1st day of January, 1888, as follows:

Benton Harbor Milling Co., 41½ acres in city limits, Niles, Mich.	\$ 4,000 00	
House and lot St. Jo., Mich.	5,000 00	
One-seventh interest in estate, Niles, Mich.	2,000 00	
One-half interest in store, lot, and building, Bangor, Mich.	1,000 00	
	500 00	
	<u>\$12,500 00</u>	
Incumbrance on above,	5,000 00	
	<u>\$ 7,500 00</u>	
Invoice merchandise ..	\$14,031 27	
Timmers' tools and store fixtures	836 00	
Notes	2,165 56	
Accounts receivable ..	5,353 05	
Freight, boxing, and carting on merchandise, 3 per cent.	419 73	
	<u>\$22,805 61</u>	
Liabilities, sundry acc'ts ..	7,615 49	15,190 12
Total assets in excess of liabilities		\$22,690 12

A schedule of liabilities upon merchandise accounts was attached. The correctness of the statement was sworn to by Frank H. Platt. On May 12, 1888, Dun's agency attached to such statement of Platt "an opinion of statement" of their own, as follows:

"May 12, '88. Opinion of statement. Should suppose that the only question here would be as to the value of the real estate, etc. Writer has seen his ledger, which shows, as he recollects it, something of this sort: Estimated Niles property at \$5,000. Understand that it is worth about \$4,000."

Again, on June 5th, Dun's agency made another report, as follows:

"June 5, '88. In writer's opinion, following is a more correct statement: Invoice of merchandise, \$8,000; timmers' tools, etc., \$500; farmers' notes, \$2,165.56; accounts receivable, \$5,353.05; 3 per cent. for freight, etc., \$419.73. Have very good reasons for placing invoice at \$8,000. The timmers' tools are old, and more or less out of date, and hardly worth \$500. The farmers' notes may foot up the figures given, but for some reason were not discountable at the time of the chattel-mortgage difficulty, Feb. 2, 1888. Accounts receivable are not worth over fifty cents on the dollar, \$3,211.83; 3 per cent. boxes, cartage, etc., \$240,—total, \$14,117.89; liabilities, total indebtedness on stock, \$7,615.49,—balance, \$6,501.90; 160 shares in milling company, at \$25, \$4,000; 41 acres, Niles city limits, \$5,000; St. Joseph house and lot, \$2,000; 1/7 interest in house of Platt estate, \$1,000; 1/2 interest in Bangor house and lot, \$500,—total, \$19,001.90; mortgage incumbrances, \$5,000. As to 160 shares, he first bought 80 shares, at \$25, making \$2,000; subsequently subscribed for 80 more, and hypothecated the first 80 to secure the payment of the second 80, leaving only, say \$2,000. The 41 acres are not worth \$5,000. They are not worth more than \$2,500. An outside figure is \$3,000. The St. Joseph house and lot he recently sold for \$1,500. 1/7 interest in the Geo. Platt family residence at Niles, Mich., is good, but not available. 1/2 interest in Bangor house and lot is not worth more than the other half, which recently sold for \$350. Recapitulation: Assets, stock, \$14,117.89; indebtedness, stock, \$7,615.49; balance assets, \$6,501.90; real-estate assets, \$7,350; real-estate mortgage, \$5,000,—assets in excess of liabilities, \$8,851.90. (Continued.)"

"June 2, '88. The mortgage was dated Aug. 8, '87, but was not filed until Jan. 28th, 1888. The note to which the mortgage was collateral was due Nov. 5th, 1887, so that this nominal security was in reality not security for the interval from Aug. 8, '87, to January 28th, 1888. In the mean time Mr. Platt had paid on the claim \$2,265.23, so that at the hour of filing there was due plus the interest, \$734.78. In the afternoon of the same day \$9.25 more was paid. So far as Mr. Platt himself is concerned, we would not have doubted his integrity, and did not file the mortgage on that account, but to anticipate

any other creditors, of whose number or extent we were not thoroughly informed. Have known Mr. Platt for some years, and have believed him personally to be a man with no bad habits nor expensive tastes, whose whole time was devoted to his business, and whose desire was to pay all his obligations. It is our opinion that one cause of his temporary embarrassment at the time of our loaning this money was the purchase of stock in the Benton Harbor Milling Company, and some other matters tending to build up and benefit this place. The milling stock is, we understand, good paying property, but it has taken the cash to pay for it."

"August 8, '88. Carries the largest stock in his line here. Has been heavily involved for some time, and came near making an assignment last winter, but instead executed a chattel mortgage to the Bank of Benton Harbor, securing \$3,000, which was discharged from record after being nearly paid up, and bank took a mortgage on some real estate near Niles. Platt is treasurer of the Benton Harbor Milling Co., and owns \$4,000 of the stock, which is hypothecated for a loan of \$2,000. Is said to sell on very close margins and below cost on many articles, and it is not deemed probable that he is making any money. Is said to have a nominal surplus of \$ to \$10,000, but is not regarded a very safe credit risk."

"Jan. 25, '89. Has a large trade, but is reckless in selling. Stock about \$7,000. Is hard up, but not so much so as at one time. Worth about \$10,000 above debts. 6-3-1-2."

With this statement as to Platt's financial standing, and with a rating in Dun's Commercial Agency of from \$5,000 to \$10,000 capital invested in his business, the plaintiff in this suit received a letter from Platt dated February 3, 1889, requesting it to quote prices on its carriages, stating that he should probably sell a few very fine outfits that season, to which the plaintiff replied, under date of February 10th, stating prices, and terms of discount and credit. Afterwards the salesman of plaintiff called personally upon Mr. Platt, and on March 7, 1889, received his order, upon the terms of 90 days net, 5 per cent. 30 days. Two days later, Platt wrote plaintiff requesting it to add to the order three spiral-spring carts. Plaintiff commenced shipping the goods March 30, 1889, and made two more shipments in April, when, before the goods were all shipped and on April 29th, the defendants wrote plaintiff requesting it to cancel order for carts and buggies. It appears that, about the same time, defendant Platt canceled other orders which he had made for goods from other parties, for the reason that he became satisfied that he should not be able to pay for them.

The plaintiff claims that it sold the goods and extended the credit to defendant solely upon the strength of the rating statement of Platt, and reports received from Dun & Co., above set out. It also claims that such statement was false and fraudulent, and made for the purpose

of inducing plaintiff to sell to him upon credit, and that, on account of such fraud, it had a right to rescind the sale and reclaim the goods. Plaintiff also claims that Platt, at the time he purchased the goods of plaintiff, did not intend to pay for them. Accordingly the plaintiff sent its attorney to Benton Harbor, where he arrived on May 18, 1889. This was on Saturday. He called at the store, where he found Frank H. Platt, and was informed that George W. Platt was sick. He told Frank H. that he had heard that they had been putting some mortgages on the property there, and it was not looking just right, and he had come to see what there was about it. That Frank H. told him they had given some mortgages, and, upon further inquiry, he stated to whom and the amounts. He was told that the mortgages covered the whole stock, including the wagons, and he said to Frank that they did not send the wagons to him to be mortgaged for old family debts, but they were sent supposing that Platt would sell them in the course of business, and then pay for them. He replied that they should pay their debts; they expected to; they should get their money upon their notes and accounts, and pay everything in three months. He then told him that he did not want to make unnecessary trouble; that he did not like the looks of things there; and if he thought he was going to pay in three months, if he could give plaintiff a note payable in six months, with an indorser, without interest, it would be satisfactory to it. It would give him three months' extra time in case he did not get around to pay all his debts. Frank said he did not want to do that. Further conversation ensued, in which the plaintiff's agent suggested that perhaps Platt could get Mr. Tatman, who then held a chattel mortgage as security for indorsing defendant's notes, to sign a note with Platt for the debt due plaintiff, and he said he would not want to do that. The witness testified: "I said to him: 'If you are not willing to do that, I have not much faith in your talk about paying in three months. With these notes here, you cannot expect us to be easy.' Then I said to him: 'So we shall have to reclaim our goods. These wagons we shall take back.' That is what I was here for, to reclaim these wagons if the matter was not satisfactory, so we could get the pay out of it." It is claimed by defendants' counsel that this was such a recognition of the contract relations between the parties as amounted to a ratification of the contract of sale. But I do not think so. It was a mere effort to get security for payment of the debt. Had he taken security, or given a valid extension of time of payment, it would have been different. A person defrauded does not lose his right to rescind by making an effort to compromise or obtain pay for the property, unless he does some act which evinces a clear intention to waive his right to rescind.

For the purpose of showing the falsity of the statement made by Frank H. Platt of his father's financial standing on January 1, 1888,

J. H. Breckenridge was introduced as a witness on the part of the plaintiff, and testified that he had been a book-keeper for 15 or 16 years at Joliet and Chicago, Ill., and had examined the books of account of George W. Platt with F. A. Hobbs. On his direct examination, he testified that on January 1, 1888, the books showed net assets \$13,376.24, and that there was a difference between what the books showed and the statement of \$9,313.88. He attempts to explain the method he pursued to reach his conclusion, which from his testimony is not very satisfactory. He deducts items which the books of George W. Platt show were in the banks at that date, because an examination of the books of the banks shows that certain checks had been charged up against the accounts, making a difference of \$1,927.44; but it was shown that the checks had been used in reducing liabilities to that amount. He deducts \$2,000 from real estate, for the reason that he finds from the cash-book the house and lot had been sold, and the proceeds put into the store, and a note given therefor to Jane E. Platt, which he puts with the liabilities. On his cross-examination, he admits that the accounts receivable, as shown by the books, were \$4,926.94, and the bills receivable were \$1,925.56, making a total of \$6,852.50; and that in his memoranda he only called them \$3,426.25; and that, counting them at their face, Platt would be worth \$3,426.25 more than he had testified he was worth the day before. It appears that this witness testified from memoranda, and that, upon adjournment of court in the evening before he was cross-examined, counsel for plaintiff furnished defendants' attorney with a copy of some figures purporting to be those used by the witness. The next morning the court called upon counsel for defendants to produce such memoranda and have them marked as an exhibit. They had not been offered in evidence, and counsel for defendants did not admit them to be copies of the memoranda from which witness testified. Nevertheless the court insisted that they should be marked as an exhibit, to be printed with the record in case the cause should be taken to the supreme court, but should not be read in evidence or considered in evidence upon the trial. The court stated that he made "the order in view of Mr. Valentine's refusal last evening to admit that these figures were furnished by counsel." Exception was taken to such ruling. That this was error there can be no doubt, but, so far as we can see, it was harmless error. The exhibit is returned and printed in the record, but is not considered by this court.

Error which was prejudicial was committed upon the examination of the witness F. A. Hobbs. He was a book-keeper and coal-dealer, and lived in Benton Harbor. He assisted Breckenridge in the examination of the books, and, in testifying, made use of memoranda, and swore that he could not testify to the exact figures without the aid of the memoranda, and that he had used it to get at the exact figures throughout his direct examination; that all the

figures upon it related to the examination of the books made by him and Breckenridge. Counsel for defendants requested the privilege of inspecting the paper to enable them to cross-examine the witness. Counsel for plaintiff refused, and the court sustained the objection. *Duncan v. Seeley*, 34 Mich. 369; *People v. Lyons*, 49 Mich. 78, 13 N. W. 365.

G. L. Manchand, a witness produced by the defendants, testified that he had been an accountant since about 1871, and had been employed by wholesale dealers of Chicago, and by the auditor of the state of Illinois; that he had examined the books of George W. Platt, with a view of ascertaining his assets and liabilities on January 1, 1888, January 1, 1889, and May 12, 1889. He produced detailed statements from which it appears that George W. Platt's net investment on January 1, 1888, was \$24,533.68; on January 1, 1889, it was \$10,835.82; and on May 12, 1889, it was \$12,000.58. That the net shrinkage in the assets between January 1, 1888, and May, 1889, was \$12,524.10, and he gave the items by which he accounted for such shrinkage. He also testified that "G 3½" represented a rating in Dun's Commercial Agency; that the letter "G" is supposed to represent the amount of capital invested, and stands for from \$5,000 to \$10,000. "3½" refers to his credit, and means "fair." The statement and reports accompanying sent out by Dun & Co., and received and acted upon by plaintiff, afforded, under the testimony in this case, no ground whatever for rescinding the contract of sale. The last report, dated January 23, 1889, was that George W. Platt had a large trade, but was reckless; that he had a stock of about \$7,000; that he was hard up, but not so much so as one time,—worth about \$10,000 above debts. The jury were asked to find, and returned that they found, that, in making the sale, the plaintiff relied upon the R. G. Dun & Co. report in evidence; and they further found that George W. Platt was worth, at the time he made the contract for the goods in question, \$5,000, or more, over and above all his liabilities, and that, when he purchased such goods, he intended to pay for them. Taking the whole of the reports made by Dun & Co., the facts therein shown to exist correspond with this finding of the jury. There was ample testimony in the case to justify such finding, and the court should have charged the jury that unless the testimony satisfied them that, at the time George W. Platt purchased the goods, he did not intend to pay for them, or unless they were satisfied from the testimony that, at the time he purchased the goods, there was a substantial difference between the report of Dun & Co. as to his financial standing and his actual financial condition at that time, so great as to convince them it was the intention of George W. Platt to defraud the plaintiff by obtaining such goods upon credit, then their verdict should be for the defendants.

This court has not gone so far in any case as to hold that traders must report to the mercantile agencies every variation in their circum-

stances. It is only when they are in an insolvent condition, and they are or should be aware that they will be obliged to suspend or fail in their business, that they owe it, as a duty to creditors, or those they solicit to deal with them upon credit, to inform them of their situation, or to notify the commercial agencies of their change of situation. Purchases not made in good faith, while in such straits, may well be regarded as fraudulent. But no fraud can be predicated upon the fact that a merchant or trader makes a representation of his standing which is truthful at the time to a commercial agency, and thereby obtains credit. If a considerable time elapses, and no new statements are made, and no new representations as to his standing, it cannot be said that, if his condition has changed, he is guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit is extended upon the strength of the original rating of the commercial agency. Fraud is a question of fact to be deduced from all the circumstances, and a vendor cannot shut his eyes to the subsequent reports of the commercial agencies tending to cast doubt and suspicion upon the financial ability and credit of a merchant or trader, and rely upon a statement by such person made a year before. The court correctly instructed the jury, as matter of law, that the plaintiff had a right to rely upon such report, inasmuch as Platt himself had made a statement to R. G. Dun & Co., but that it must be presumed that the plaintiff, if it relied at all upon the report, relied upon the report sent by R. G. Dun & Co. as a whole, and not upon any particular part of it. But the court immediately after proceeded, inadvertently, it may be presumed, to instruct the jury as follows: "Now, then, gentlemen, if Geo. W. Platt on January 1, 1888, was worth a material sum less than appears from the representations made by Frank to R. G. Dun & Co., and if this plaintiff, when

shipping the wagons, relied upon such statement, and shipped them on the strength of such statement, and if, when the wagons in question were shipped, Geo. W. Platt's pecuniary affairs were materially worse than was disclosed in the report of R. G. Dun & Co. as a whole, this plaintiff had the right to rescind the contract of sale, and to take back all wagons not sold to bona fide purchasers, no matter whether Frank H. Platt did or did not intend to make a false statement to R. G. Dun & Co." Here the statement made by Frank H. Platt is given undue prominence, and the jury are told that if plaintiff relied on this statement, instead of the report as a whole, as he should have charged, then the plaintiff could rescind. It is true that this error was modified subsequently by including the whole report, as an inducement to the sale; but we cannot say that the jury did not give weight to this portion of the charge, more especially as we cannot otherwise conceive of any basis for a general verdict for the plaintiff. The special finding above stated required that the general verdict should have been rendered for the defendants. It is the only one that can be rendered consistent with the special findings. This view of the merits renders it unnecessary to discuss many of the errors assigned upon the record.

The defendants' counsel moved the court that judgment be entered for the defendants upon the special findings of the jury, which motion the court refused, and instead rendered a judgment for the plaintiff upon the general verdict. The judgment must be reversed, with costs of both courts to defendants, and the cause remanded, with instructions to the trial court to vacate and set aside the judgment for plaintiff, and to render judgment in favor of defendants, to the end that such further proceedings may be had therein governing the action of replevin as the statute requires. The other justices concurred.

CRANE CO. v. COLUMBUS CONST. CO.
(20 C. C. A. 233, 73 Fed. 984.)

Circuit Court of Appeals, Seventh Circuit.
May 4, 1896.

No. 268.

In error to the circuit court of the United States for the Northern district of Illinois, Northern division.

This was an action by the Columbus Construction Company against the Crane Company to recover for a alleged breach of a contract of sale. The circuit court sustained demurrers to the declaration, and, plaintiff declining to amend, judgment was rendered for defendant. On appeal to this court, that judgment was reversed, and the cause remanded for further proceedings. 3 C. C. A. 216, 52 Fed. 635. Afterwards a trial was had before a jury, resulting in a verdict and judgment for plaintiff in the sum of \$48,000, and defendant brings the case here on writ of error.

Edwin Walker and Chas. S. Holt, for plaintiff in error. Geo. Hunt and S. S. Gregory, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. For the entire contract between the parties to this appeal, and for the construction put upon it by this court when the case was first here, reference is made to the opinion in *Columbus Const. Co. v. Crane Co.*, 3 C. C. A. 216, 52 Fed. 635, and 9 U. S. App. 46. After the case had been remanded, further counts, special and common, were added to the declaration; but, while the breaches of warranty relied upon and the damages claimed were stated more specifically and fully, the character of the action was not changed.

The defendant in error, the Columbus Construction Company, a corporation of New Jersey, on the 5th day of June, 1890, entered into a contract with the Indiana Natural Gas & Oil Company (which was incorporated under the laws of Indiana for the purpose of owning and operating a pipe line for the transportation of natural gas from the gas fields of Indiana to Chicago), whereby the Columbus Company undertook to construct the proposed line; and to that end, on June 20, 1890, it made with the Crane Company (the plaintiff in error) the contract in suit, whereby the latter company undertook to purchase, and to cause to be delivered to the former, the various quantities and sizes of pipe necessary for the completion of the line, including 260 miles of 8-inch pipe concerning which this controversy has arisen. The substance of the contract, in so far as it need be stated here, is that the pipe shall be "8-inch wrought-iron standard line pipe, to weigh not less than 27.48 pounds per lineal foot," "made from soft iron, free from blisters and other imperfections, and guaranteed to stand a working line pressure of one thousand pounds to the square inch when proved and tested in lines"; that each spliced joint shall weigh the weight of the collar in addition to its

own required weight; that each joint of pipe shall have eight threads to the inch, and at least two inches of thread on each end, with a full uniform taper to the threads both on the pipe and in the collar; and that the vendor shall pay to the vendee all damages and expenses sustained by reason of defects in the pipe delivered, up to and including the time when the pipe should be tested by the vendee under working pressure, not in excess of one thousand pounds to the square inch, and proved tight in line, which working test should be made with reasonable promptness. Deliveries were to be made at such places as should be designated by the Columbus Company, at the earliest practicable dates, in July, August, and September, and of the 8-inch pipe not less than 37 miles in July, 123 miles in August, and the remainder in September, 1890, "barring strikes and causes beyond control." The Columbus Company, upon the delivery of each invoice at the point by it designated, was to pay "spot cash" therefor, including a commission of 2½ per cent. over the amount of the manufacturer's invoice. Shipments were to be by car loads, not exceeding five spliced joints, the Crane Company paying freight and other charges of transportation from the mills to the points of destination; and it was agreed finally that the pipe should not be construed to be accepted, by reason of any payments made therefor, so as to relieve the Crane Company from liability on account of its defective character, until the same had been laid and tested in line, and proved.

In pursuance of this contract, the Crane Company made contracts with different companies for the manufacture and shipment of the required pipe, and reported the same for approval to the Columbus Company. The first shipment, amounting to about 12 miles, was delivered, by order of the Columbus Company, to the Consumers' Gas Company, at Chicago, but was not used until two years later, when it was shipped to Indiana, and laid in line. In addition, by November 3, 1890, 8-inch pipe had been delivered at different stations along the line, to the amount of 95.14 miles, of which 5.7 miles were laid in or across the Tolleston Marsh, 1 mile was laid at the Kankakee Marsh, and 12.65 miles, in double lines of half that length, were laid at Deep River. Further deliveries were then suspended by agreement or mutual consent, until more adequate appliances for testing the pipe in line could be obtained; the tests made in September, 1890, at Deep River, with an air pump of a capacity of 110 pounds to the square inch, having developed serious leaking at as many as 10 per cent. of the joints, and "more at the mill end than at the field end." Besides conflicting views of the contract liabilities of the parties, which were settled only by the decision of this court referred to, the agents of the parties who were present at the tests differed in respect to the nature and cause of the defects in the joints; it being claimed on behalf of the plaintiff in error that the pipe was all tested at the mills, and, without leaking, stood a pressure of 1,000 pounds to the inch,

and that the defects developed in line were attributable to rough and careless handling and unskillful laying of the pipe. On the contrary, the representatives of the defendant in error asserted a careful and skillful manipulation and laying of the pipe, and, in the first instance, attributed the defects to the light weight of the collars, by reason of which they expanded under pressure, but the subsequent employment of heavier collars did not cure the defects; and the later conclusion seems to have been reached that the threads on the ends of the pipe and in the collars did not have a full and uniform taper, the fault being in the thread of the collar. During the ensuing October, efforts were made, by caulking and otherwise, to tighten the defective joints, and, up to a pressure of 200 pounds, were perhaps substantially successful; but, about the 28th of that month, high pressure pumps were brought into use, which, at a pressure of 400 pounds, reopened some of the old leaks, and disclosed many new ones. Further attempts were then made, by caulking and other means, to remedy the defects, but with unsatisfactory results, until November 15th, when winter set in, and work was stopped.

On the other hand, while there had been delays in the delivery of pipe, the Columbus Company had not paid in full for the pipe delivered; and on September 29th the shortage had risen to \$139,000, but by later payments, the last of which, in the sum of \$15,000, was made November 26th, the deficiency was reduced to \$73,800. These shortages were the subject of correspondence, and of complaint by the Crane Company, in behalf of which it is claimed that, while various excuses were offered, it was never assigned "as the reason for not paying spot cash that the pipe was not satisfactory"; that complaint was once made by Mr. Yerkes, who, in October, had succeeded Mr. Hequembourg as the representative of the Columbus Company in the transaction, that some of the pipe shipped by the Reading Company had been forwarded in a damaged condition, but that, it having been found on investigation that some of the threads had been jammed in transit, the Crane Company offered to have all damaged pipe put in order, and returned to the place of use, at its own expense, and that nothing was said at any time about a deficiency in the weight of the collars, or about any defect other than jammed threads; that on December 31, 1890, Mr. Yerkes offered in writing to accept the proposition for repairing pipe, and to pay therefor when returned and further inspected, but upon condition that the mills should commence delivery of pipe, to fill the balance of their contracts, on February 1, 1891, and that the contract be modified so that, instead of spot cash for all pipe delivered, 50 per cent. of the price should be paid on delivery, and the remainder after a test in line, under a pressure of 1,000 pounds to the square inch; that the Crane Company refused to accede to this change in the terms of payment, and now

contends that its proposition to repair the damaged threads was thereby in effect rejected by Yerkes. This difference, it seems, divided the parties until January 30, 1891, when Mr. Yerkes telegraphed the Crane Company:

"We are prepared to receive pipe in accordance with contract, particularly that part which provides for a test of 1,000 pounds when laid. Although you have not complied with terms of your contract, we will receive pipe if you commence immediate delivery."

--And, receiving no response, on February 12, 1891, wrote as follows:

"On the 30th ult., I telegraphed you from New York as follows: 'We are prepared to receive pipe in accordance with contract, particularly that part which provides for a test of one thousand pounds when laid. Although you have not complied with terms of your contract, we will receive pipe if you commence immediate delivery.' Up to the present time, I understand, you have had no pipe delivered this year. I wish to notify you that we cannot wait longer for the said delivery, and will therefore cancel our contract. In regard to the pipe that has already been delivered, we are prepared to make some arrangement with you respecting the repair of same, and adjusting the accounts now remaining open.

"[Signed] Chas. T. Yerkes,
"Vice Pres't., C. C. Co."

To that letter, the Crane Company on the same day responded as follows:

"Your young man brought in yours of even date a few minutes ago, and upon its receipt it struck me that there was no occasion for any reply in view of all that has been said and written, but have since concluded that we had better make answer, in order that we may keep our record straight. Would say that we answered yours of January 30th, from New York, to the effect that we were prepared to go ahead with your pipe line contract on the conditions of said contract, and we are now prepared to do so. But you have persistently requested that we go ahead on the contract upon terms different from the contract, and this we have persistently refused, and now refuse to do. We have simply demanded that you carry out your part of the contract, and desire now to notify you that, if you cancel this contract, you do so at your peril, and we will hold you responsible for the results. We have not delivered any of the pipe this year, because you have not asked us to deliver it, and because you have not complied with your part of the contract. We have been, as we are now, awaiting your orders to go on with the contract, and will do so when you comply with your part of the contract.

"[Signed] Crane Company,
"R. T. Crane, Pres't."

In the following March, Mr. Hequembourg resumed charge, and reaching the conclusion, after some further tests, that the collars fur-

nished by the Crane Company were too light, procured heavier collars, at an expense for those used upon the Crane Company's pipe of \$104,000, and proceeded to lay the line, using the Crane pipe so far as it went; the total extra expense alleged to have been incurred in making that pipe available being the sum of \$200,000, most of which the plaintiff in error insists was incurred by reason of the false theory, negligently adopted and pursued, that the Crane collars were too light. The line was finished and turned over to the Indiana company late in 1892. The defective taper in the threads of the collars, it is asserted by the plaintiff in error, was not discovered until just before the trial of this case, which was commenced December 3, 1894, and therefore could not have been the ground for the rejection of the pipe. The suit was commenced May 23, 1891, the declaration being framed as "of a plea of trespass on the case upon promises," and charging, in substance, that the pipe was made of imperfect iron, and was incapable, when tested in line, of standing the required pressure, and that the threads upon the pipe and in the collars did not have a uniform taper. The plaintiff in error tendered the general issue, with notice of special matter. The trial resulted in a verdict and judgment in the sum of \$48,000 for the defendant in error. Numerous errors are assigned, but the questions to be considered are comparatively few.

Evidence of certain tests made of the pipe in line was admissible to show the quality and value of the pipe delivered as compared with that contracted for; and if the tests were made without notice to the plaintiff in error, and not within a reasonable time after delivery of the pipe, the value, but not the competency, of the testimony, was affected by those circumstances.

Upon the question whether the pipe was handled carefully and properly laid, witnesses who supervised or participated in the work were permitted to testify that, in their opinion, the workmen were skillful, and the work well done. It was competent, we think, to show that men of experience and skill were employed upon the work; and doubtless, in such a case, a witness may be required to state what defect, if any, he saw in the work, or what carelessness or lack of skill in the manner of its execution; but the general question whether the line or lines of pipe in question had been laid with proper skill and care was not one, we think, to be determined upon the opinions of witnesses. Among the cases cited touching the point are *Provision Co. v. Bajer*, 20 Ill. App. 376; *Railroad Co. v. Clark*, 108 Ill. 113; *Morris v. Town of East Haven*, 41 Conn. 252; *Turnpike Co. v. Coover*, 26 Ohio St. 529.

A more serious question has arisen upon the admission of testimony to show the cost of taking up, repairing, and relaying of pipe at Deep River, Tolleston, and Kankakee. Proof was made that in 1891 and 1892, after

the bringing of this suit, the Columbus Company, having determined to make use of the pipe which had been delivered, took up what had been laid, removed the Crane collars, re-threaded such pipe as had been bent or caulked, put on heavier collars, and relaid the pipe where it had been before. The men employed in doing this work were at the same time engaged in other work, and no separate account was kept of the labor and expense incident to the changing of the collars, and rethreading and relaying of the pipe received of the Crane Company. The excuse offered is that it could not be done with economy. On direct examination, Mr. Hequembourg, testifying for his company, stated that the cost per foot of taking up and relaying the pipe was \$1.50 at Tolleston, 75 cents at Deep River, and at Kankakee \$1. The cross-examination showed that these were mere estimates, prepared without personal knowledge of the facts, from reports which were not designed for the purpose, and contained no data to enable him to reach a definite and just conclusion. These estimates were clearly incompetent. They were mere guesses by a witness interested to make the figures large. He testified that it was his "particular business to ascertain what was a fair amount to charge the defendant for changing the collars and reconstructing the line"; and, that being so, he should have kept, or caused to be kept, accurate and distinct accounts of the labor and expense as the work progressed, and should not have been allowed to give to the jury, as the result of a calculation the basis of which was not shown, the very large sum mentioned, and then to testify, as he did, that that sum was the reasonable cost of the several items included in the estimate. Such evidence does not become competent, under ordinary circumstances, because better evidence may not be at hand.

Error is also assigned upon the exclusion of evidence offered by the plaintiff in error for the purpose of showing that useless and unreasonable expense had been incurred by the defendant in error in its efforts to make the pipe conform to the specifications, fulfill the conditions, and stand the tests required by the contract. The Columbus Company was engaged in laying a pipe line, not directly for its own use, but for the Indiana Company, with which it had made the contract of June 5, 1890. By an act of the Indiana legislature approved March 4, 1891, regulating the mode of procuring, transporting, and using natural gas, the use of more than natural pressure or an artificial pressure exceeding 300 pounds to the square inch was forbidden; and by a decision of the supreme court of that state, handed down June 20, 1891, the act had been declared constitutional. *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76. The defendant in error and the Indiana Company were joint parties to that suit, and, as a result of the decision, they modi-

fied their contract so as to require the pipe and collar to be tested at the mill under 1,000 pounds hydraulic pressure, and, when laid, to stand, for 24 consecutive hours, a working pressure of 400 pounds to the square inch, without manifest or material defects, or leakage exceeding 10 per cent, of its total storage capacity; the tests to be made in five-mile sections, as soon as each section should be completed. The plaintiff in error offered to put the contract and the modification in evidence, and asked the court to give to the jury, at the proper time, an instruction which, after referring to the Indiana statute and other relevant and undisputed facts, proceeded as follows:

"If, therefore, the jury find from the evidence that the pipe delivered to the plaintiff by the defendant under its contract, prior to the commencement of this action, was of sufficient structural strength to stand a working line pressure of three hundred pounds to the square inch, and also that the threading and taper conformed to the specifications of the contract, so that the line, when constructed, was sufficient for the transportation of the gas at the pressure of three hundred pounds, as limited by law; and if you further believe that, after the commencement of this action, the plaintiff unreasonably and unnecessarily expended money in the purchase of new couplers, and in exchanging such new couplers for the old, for the alleged purpose of constructing a line that would stand a pressure of a thousand pounds to the square inch; and if you further believe from the evidence that such expenditure was unreasonable and unnecessary,—then the court instructs you that you should not find for the plaintiff as damages the amount of money so expended."

We are of the opinion that the evidence should have been admitted and the instruction given. By the general rule governing the measure of damages for a breach of warranty in the sale of chattels, the defendant in error, having paid the entire purchase price, was entitled to reclaim a sum equal to the difference in value between the pipe delivered and pipe of the quality warranted; and if, at the time of delivery, it remained necessary or desirable, and was practicable, by a reasonable expenditure, to bring the pipe up to the requirements of the contract, it was the privilege of the defendant in error to make the expenditure necessary for that purpose, and to exact reimbursement of the Crane Company, instead of resorting to the proof of comparative values. But if, as the proposed instruction assumes, the pipe met the requirements of the modified contract with the Indiana Company, and, by reason of the Indiana statute, a pipe capable of bearing a pressure of more than 300 pounds was not needed, then, manifestly, it was unreasonable to expend time or money in an effort to impart to the pipe a degree of strength which could be of no practical utility. Under such circumstances, the ordinary rule should prevail, and the recovery

should be on the basis of the difference of value between the article delivered and that which ought to have been delivered,—to be determined by the market prices, or, if that should be impracticable, then, probably, by the difference in cost of production at the mills; certainly not by the cost of repair or reconstruction in or along the trenches in which the pipe was to be laid, where necessarily the work would be more difficult and expensive than at the mills. The instruction asked was hypothetical, leaving to the jury to determine whether the facts were as supposed, and whether the expenditures in question were reasonable, and if the modified contract with the Indiana Company had been admitted in evidence, the instruction would have been pertinent and proper to be given. The statute of Indiana, and the decision of the supreme court of that state whereby it was declared constitutional, were matters of judicial cognizance, in respect to which formal proof was unnecessary. Among the authorities cited touching the measure of damages in such cases, besides the texts of Parsons, Sedgwick, Sutherland, and Addison, are the following: *Marsh v. McPherson*, 105 U. S. 716; *U. S. v. Behan*, 110 U. S. 339, 4 Sup. Ct. 81; *Blacker v. Slown*, 114 Ind. 322, 16 N. E. 621; *Smith v. Dunlap*, 12 Ill. 184; *Miller v. Mariners' Church*, 7 Me. 51; *Le Blanche v. Railroad Co.*, 1 C. P. Div. 286; *Hamilton v. McPherson*, 28 N. Y. 72; *Frick Co. v. Falk* (Kan. Sup.) 32 Pac. 309; *Loomer v. Thomas* (Neb.) 56 N. W. 973; *Lake Co. v. Elkins*, 34 Mich. 439; *Bradley v. Denton*, 3 Wis. 557; *Dillon v. Anderson*, 43 N. Y. 231; *Muller v. Eno*, 14 N. Y. 597; *Passinger v. Thorburn*, 34 N. Y. 634; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Fisk v. Tank*, 12 Wis. 276; *Brown v. Bigelow*, 10 Allen. 242; *Medbury v. Watson*, 6 Mete. (Mass.) 246.

But the question which is most earnestly disputed is whether, in respect to the pipe delivered and retained, the defendant in error, by reason of its refusal, in the letter of February 12, 1890, to accept further deliveries under the contract, is debarred of the right to sue for a breach of the warranty of quality. It is insisted that the refusal to accept more pipe was justified by the bad quality of that received, the presumption being under the circumstances that further deliveries, coming from the same mills, would be of the same bad quality. That was a question of fact, which, if the evidence was sufficient, should have been left to the jury; but it is to be observed that the refusal was not put upon that ground, but on the ground that no pipe had been delivered recently, though no order or request, with a designation of the place for such delivery, had been made. On the facts as presented in the briefs, beyond which we have not looked, it does not appear that there was an adequate excuse for the refusal to accept further performance of the contract; but, whether there was or not, it was the right of the plaintiff in error to have the case submit-

ted to the jury upon the hypothesis that nothing had been done to justify a termination of the contract by the defendant in error; and on that basis, whether other modes of relief were available or not, we think it clear that the defendant in error can have no remedy in an action upon the contract. It cannot at one and the same time repudiate an executory contract like this in respect to a part of the subject-matter, and in respect to other parts insist upon its enforcement. If the declaration had disclosed such a breach or unexcused repudiation of the contract by the plaintiff, it would have been plainly demurrable. Only upon the theory that the Crane Company had been guilty of a breach or breaches which justified the other party in refusing further performance was the action maintainable as brought; and yet from the damages which the jury was directed to award the plaintiff, on account of the defective quality of the pipe delivered, a deduction was authorized of the amount of commission which that company would have earned if it had been permitted to deliver the remainder of the pipe, and a further deduction on account of a decline in the market price of pipe. If the conduct of the Crane Company was such as to justify a refusal of the other party to receive further deliveries, it was entitled to no profit thereon by way of commission or otherwise (*U. S. v. Behan*, 110 U. S. 339, 4 Sup. St. 81); and just as if the contract had been terminated by agreement, or as if the pipe delivered had been the total amount called for by the contract, the Columbus Company was entitled to recover undiminished damages, equal to the difference in value between the pipe delivered and pipe of the stipulated quality.

It is not a case of rescission. That requires the placing of both parties in statu quo, and in this case would have involved a return, or at least a tender back, of the pipe which had been received. Neither is it a case of refusal to receive particular lots of pipe, offered for delivery, because the same was visibly, or, upon immediate inspection, was found to be, defective. The rejection of such pipe, before placing it in line, would not have been an act either of rescission or repudiation, but rather of enforcement of the contract. *Barrie v. Earle*, 143 Mass. 1, 5 S. N. E. 639; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69. But upon the hypothesis of the proposed instruction, which, together with the evidence offered in support of it, ought, as we think, to have been submitted to the jury, it is simply a case where, under a contract of sale which is executory and entire, the vendee repudiates the contract in respect to a part of the goods, and in respect to the remainder seeks to enforce it,—a proposition which, we believe, is supported neither by reason nor precedent. The earlier cases touching the general subject, both English and American, are collected in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 17-53, and while, in some respects, there

has been a contrariety of ruling, no case has been cited which is perceived to be inconsistent with our present conclusion. The case of *Norrington v. Wright*, supra, was not in fact a case of rescission, though partially so treated. It was a suit by the vendor, seeking damages of the vendees on account of their refusal to accept consignments of old T rails, which, by the contract, were to be shipped 1,000 tons per month, to the total number of 5,000 tons. The vendees accepted and paid for 400 tons, received in one consignment, but afterwards, learning that the quantities shipped during three months did not correspond with the requirement of the contract, refused to accept or pay for any more. The court held the contract to be entire, and the specification of the quantity to be delivered each month to be descriptive of the goods, a departure from which through three months "justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission"; and their retention of the 400 tons received in February, it was said, "was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties." To make that case like this, on the theory of rescission, it is necessary to reverse the parties, and to suppose that the vendees, after receiving and paying for the 400 tons shipped in February, had learned at once that no more had been shipped during that month, and having on that account refused to receive further consignments, even though offered in conformity with the contract, had brought suit for damages for the failure of the vendor to ship 1,000 tons in February, instead of the 400 tons received and retained. If that had been the case, it would hardly have been said that the keeping of the 400 tons was not a waiver of the right of rescission. The case is expressly distinguished from *Lyon v. Bertram*, 20 How. 149; and the proposition is announced, which alone and independently of the doctrine of rescission was sufficient to dispose of the suit, that "the plaintiff, denying the defendant's right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action." The principle of that proposition is applicable here. Having repudiated the contract in part, the defendant in error had no right to ask its enforcement in another part. See *Clark v. Steel Works*, 3 C. C. A. 600, 53 Fed. 494, and 3 U. S. App. 358. In *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, the contract was for the sale of 500 tons of American iron and 300 tons of Scotch iron, which the seller undertook to ship to the buyer. The contro-

versy was concerning the American iron alone, which, after delivery at Milwaukee, the purchaser refused to accept, on the ground that it was not of the grade called for by the contract, and, having notified the seller that the iron was held subject to his order, brought suit to recover the price which had been paid for the iron and the freight thereon. The point decided was that, the jury having found that the iron was not of the quality which the contract required, "on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do." The syllabus couples, with the right to reject, the right to "rescind the sale," but that is taken from the court's statement of a general proposition of law in respect to sales by sample. When the entire subject of a contract of sale is rejected, it amounts to a rescission of the contract; but when a part of the subject is accepted, and another part rejected, because not of the quality contracted for, it is not a rescission. In *Pope v. Allis* it does not appear whether or not the Scotch iron included in the contract was received by the purchaser. If not, then the case was, as it seems to have been treated, the same as if the American iron alone had been the subject of the sale, and the rejection of the iron was a rescission; but, if the Scotch iron was received and retained, it was not a rescission, but simply a rejection of the American iron, on the ground stated, that "the vendee cannot be obliged to receive and pay for a thing different from that for which he con-

tracted"; just as the defendant in error here was not bound to receive a shipment of pipe which was visibly below the contract standard, though the test provided for was to be made when the pipe was in line. But, under this contract, the vendor would have had the right, within a reasonable time, to furnish, in lieu of pipe so rejected, other pipe of the required quality; while in the case of *Pope v. Allis* such right of substitution was not contemplated, and probably did not exist. In *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.*, 17 C. C. A. 34, 70 Fed. 146, the rule that rescission must be total is strongly stated, and numerous authorities are cited. Many cases have been cited which afford little aid to the decision of this one, because they grew out of completed deliveries, and involved no question of partial or imperfect performance by the party who was seeking a remedy upon the contract. In *Cherry Valley Iron Co. v. Florence Iron River Co.*, 12 C. C. A. 306, 64 Fed. 569, the contract, which was for the sale of a quantity of ore to be delivered and paid for monthly, is broadly distinguished from the present contract by the single provision that, if the purchaser failed to pay as agreed, the seller should have the right to cancel the contract in respect to ore not delivered at the time of the default in payment.

The judgment below is reversed, and the cause remanded, with instruction to grant a new trial.

ILLINOIS LEATHER CO. v. FLYNN.

(65 N. W. 519.)

Supreme Court of Michigan. Dec. 30, 1895.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Replevin by the Illinois Leather Company against William H. Flynn, receiver of W. A. Bourke & Co. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Willis G. Clark, for appellant. Frank D. Andrus (John D. Conely, of counsel), for appellee.

MONTGOMERY, J. Defendant was appointed receiver of the property covered by a chattel mortgage given by W. A. Bourke & Co. to the City Savings Bank of Detroit. Plaintiff, by permission of the court, brought replevin against the receiver for 1,001 bales of hair ordered of plaintiff February 10, 1895, and shipped to Bourke & Co. April 15, 1895. On the trial, plaintiffs contended that the goods were bought and sold by Bourke & Co., under circumstances raising a presumption that they received the goods, having formed the intention of not paying for them, or at least under circumstances that show that a man of ordinary prudence would have known that he could not have continued the business until the maturity of plaintiff's claim; and the chief contention, as made in this court, is that, under such circumstances, a purchase is to be deemed fraudulent in law. We think the law is otherwise. It is not the law that, though a dealer is insolvent, he is guilty of fraud if he continues to purchase goods, if he buys in good faith, and in the expectation of continuing in the business. He is not bound

to abandon hope. It is true there is a class of cases in which it has been held that, where the natural effect of the acts of the party is to work a fraud against another, the absence of an intent to defraud is not a defense; but it is not a fraud per se for a purchaser of goods to fail to make payment, nor is it a fraud per se for a dealer to purchase goods, though insolvent, in the absence of any misrepresentation, and with the intention of paying for them; nor does the fact of a subsequent failure make the purchase fraudulent by relation. What constitutes fraud in such a case is the purpose of the buyer not to pay for the goods. This is not determined by what purpose some other less hopeful of success in his ventures might under like circumstances have entertained; but, to constitute the purchase fraudulent on this ground, there must have been an actual intent on the part of the purchaser to obtain the goods without paying for them. Tied. Sales, § 107, and cases cited; *Morris v. Talcott*, 96 N. Y. 100; *Doyle v. Mizner*, 40 Mich. 161; *Edson v. Hudson*, 83 Mich. 450, 47 N. W. 347. The circuit judge in the present case withdrew the question of fact from the jury. An examination of the testimony satisfies us that there was no error in this. While there was testimony which might be construed as showing the insolvency of Bourke & Co., as we have pointed out, this fact alone, if established, would not have justified a verdict for the plaintiff. There was no proof of any misrepresentation, nor, as we think, was there any testimony tending to show a preconceived purpose of obtaining these goods, and avoiding payment therefor. The judgment will be affirmed.

McGRATH, C. J., did not sit. The other justices concurred.

PETERS BOX & LUMBER CO. v. LESH et al.

(20 N. E. 291, 119 Ind. 98.)

Supreme Court of Indiana. Feb. 21, 1889.

Appeal from circuit court, Huntington county; Henry B. Sayles, Judge.

Action of replevin against the Peters Box & Lumber Company by W. H. and J. A. Lesh, to recover certain lumber. Judgment for plaintiffs, and defendant appeals.

A. Zollars, H. Colerick, and W. S. Oppenheim, for appellant. F. W. Rawles and T. E. Ellison, for appellees.

COFFEY, J. This action was brought by the appellees against the appellant in the Allen circuit court, to recover certain lumber and logs described in the complaint. The cause was put at issue by a general denial, and the venue was changed to the Huntington circuit court. The cause was tried by a jury, who returned a verdict for the appellees, assessing the value of the property at \$270. Motion for a new trial overruled and excepted to, and judgment on the verdict.

The errors assigned in this case are: (1) That the Huntington circuit court had no jurisdiction over the cause; (2) that the court erred in overruling the motion for a new trial. No point is made in the brief of counsel for the appellant on the first assignment of error, and, therefore, the same is waived. The evidence on the part of the appellees tends to prove that the appellant is a corporation carrying on a large saw-mill and lumber business at the city of Fort Wayne, Ind.; that the appellees, in November, 1883, had been and were operating a saw-mill at Sidney, Kosciusko county, Ind.; that a man calling himself Milliard came to Sidney, and represented to the appellees that he was the agent of the appellant, to buy lumber and logs for it. The appellant had, before that, to the knowledge of the appellees, bought such property in that vicinity, and they supposed he was such agent. One of the appellees went with the said Milliard to several places, where he bought logs for the appellant, and they finally sold him, as the agent of appellant, the property in question, for \$263. By their agreement, it was to be measured, put on the cars, the measurement to be sent to the appellant and it to immediately pay the bill by a draft on New York. The property was measured, sold, and shipped on Monday, and Milliard left Fort Wayne on Tuesday. The draft not coming, one of the appellees went to Fort Wayne on Tuesday, where he met Mr. Papa, the appellant's president, and asked him to pay for said property. Papa denied the authority of Milliard to act for the appellant, and, after demand, refused to deliver the property, and also refused to say much about the contract of appellant with Milliard, or to say how much he had been paid for the property. The appellant did in fact pay

Milliard \$125 for the property in controversy. Immediately after the delivery of the property to it by Milliard, the appellant commenced to saw up the logs and mix the lumber with its own. Up to this point there seems to be no disagreement about the facts. It is claimed by the appellant that bills of lading were made out for the property in the name of Milliard, with the consent of one of the appellees, but this fact is disputed by the appellees, who claim that there was nothing made out at the freight office from which the property was shipped except a receipt for the property.

The court gave to the jury the following instruction: "Should you find from the evidence that the title and right to possession of the property in controversy is in the plaintiffs, and if you further find that the defendant, in the purchase of said property, was in no fault, then you should find the value of said property at what you believe was its fair market value in the condition and place it was situated when the plaintiffs demanded the same of the defendant, if such demand were made, exclusive of any expenses or labor the defendant may have invested in manufacturing the same into lumber up to the time said demand was made. But if the evidence shows defendant knew or ought to have known that Milliard was not the real owner, then you should not take into consideration any expense or labor the defendant put upon said logs and lumber, but give the plaintiffs a verdict for the full value at the time and place it was demanded, and in its condition then." To the giving of this instruction the appellant excepted.

The court had previously instructed the jury, substantially, that if Milliard had represented himself to the appellees as the agent of the appellant, and they, relying on such representation, sold him the property in controversy as such agent, without any intention of vesting the title in him, but intending to vest it in the appellant, when he was in fact not the agent of the appellant, such sale was void and vested no title in Milliard, and he could not by a subsequent sale vest title to the property in the appellant.

This case comes clearly within the law as enunciated in the case of *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, and 5 N. E. 908. It is there distinctly decided that in a case like this no title passes to the fraudulent purchaser, and that such purchaser cannot by any subsequent sale transfer title to another, for the reason that he has none to transfer. It must be true, then, that at the time the appellees demanded possession of the property of the appellant, at Fort Wayne, the title was in them, as well as the right to the possession. It was the duty of the appellant to surrender to them such possession, and upon its failure or refusal to do so, what were they entitled to

recover? It is earnestly contended by the learned counsel for the appellant that, as the freight from Sidney to Fort Wayne was paid by the appellant, the measure of the appellees' damages was the value of the property at Sidney. But it must be remembered that the appellant did not purchase the property at Sidney. It was purchased at Fort Wayne; and the appellant must be presumed to have taken into consideration the amount he would be compelled to pay to obtain possession of the property, in fixing its value at the time of the purchase. It certainly will not be contended that the appellant could refuse to deliver the possession, upon demand, because it had paid the freight. Nor can it be successfully claimed that Milliard, the fraudulent purchaser, could claim to have the freight refunded to him if he had been caught at Fort Wayne, before he had disposed of the property. Section 572, Rev. St. 1881, provides that in actions to recover the possession of personal property judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and for damages for the detention thereof. It is not denied that at the time of the demand the appellant had the property in controversy, and that it could have delivered it to the appellees. By refusing to do so, we think it became liable to the appellees for the value of such property at the time and place of such demand and refusal, less any additional value it may have had by reason of labor bestowed upon it, in good faith, before such demand was made. *Mitchell v. Burch*, 36 Ind. 529; *Wells*, Repl. §§ 549, 563; *Cushing v. Longfellow*, 26 Me. 306. It is claimed that in actions for trover the rule is different, but, as this is an action of replevin, we need not, and in fact do not, decide that question.

It is earnestly insisted by the learned counsel for the appellant that as the appellees permitted Milliard to take bills of lading in his name, and thus enabled him to sell the

property to an innocent purchaser for full value, they are now estopped from claiming the property in controversy in the hands of the appellant. Instructions were given by the court, and others asked by the appellant, and refused, which fairly raise this question.

The court instructed the jury that if Milliard had the bills of lading made out in his own name as the consignor, to enable him to fraudulently sell the same to the defendant, and the plaintiffs knew that the property was so shipped, and that Milliard's purpose in so shipping said property was that he might fraudulently sell the same to the defendant, then their verdict should be for the defendant. In the case of *Alexander v. Swackhamer*, supra, this court, by Mitchell, J., says: "The appellee was not estopped on the ground of negligence in delivering the cattle under the circumstances disclosed. To constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defense which he proposes to set up, and another must have acted on such admission with his knowledge and consent." If the appellees acted under the belief that Milliard was the agent of the appellant, and that they were selling the property to the appellant, basing such belief on the representations made to them by Milliard, we do not think that they would be estopped from claiming their property by reason of permitting the bills of lading to be made out in the name of the supposed agent. The instructions asked by the appellant ignore this phase of the case, and we think the court properly refused to give them. We are of the opinion that the instruction given by the court properly stated the law applicable to the case as made by the evidence.

We find no error in the record for which the judgment should be reversed. Judgment affirmed.

Petition for rehearing overruled.

BYRNES v. VOLZ et al.

(54 N. W. 942, 53 Minn. 110.)

Supreme Court of Minnesota. April 27, 1893.

Appeal from district court, Rice county; Buckham, Judge.

Action by George W. Byrnes, as receiver of the estate of Adolph F. Schacht, against John Volz and others and Charles Thonet, to declare fraudulent a transfer of a note to Thonet by Schacht pending divorce proceedings against the latter by his wife, and apply the proceeds of the note in payment of the wife's judgment for divorce and alimony. There was judgment in favor of plaintiff, and defendant Thonet appeals. Affirmed.

Thos. H. Quinn, for appellant. H. S. Gipson, for respondent.

DICKINSON, J. This appeal from a judgment of the district court brings in question the correctness of the legal conclusions of that court from the facts found by it. The facts as found by the court may be thus stated: During the pendency of an action for divorce, prosecuted by a Mrs. Schacht against her husband, Adolph F. Schacht, one of the defendants in this action, the said Schacht indorsed and transferred to this defendant, Thonet, a promissory note for the sum of \$500, the same being the property of Schacht. In consideration thereof Thonet agreed to pay certain debts of Schacht, and to board the latter for one year, the value of which board was fixed at \$200. Schacht was also indebted to Thonet in the sum of \$45, which indebtedness was agreed to be discharged by this transfer. Thonet knew of the pendency of the divorce suit, and this note was transferred by Schacht, and was received by Thonet, for the purpose and with the intent of hindering, delaying, and defrauding the wife as to any alimony which might be awarded to her, and to render ineffectual any money judgment which she might recover in such pending action. Subsequent to the rendition of judgment in favor of the wife, awarding a divorce with alimony, and after the return unsatisfied of an execution against Schacht, and the institution of proceedings supplementary to execution, in which Thonet had been required to appear and testify as to property of the judgment debtor in his hands, Thonet received payment of the amount then due on the note, \$425. Thereafter he paid out for the defendant Schacht, for debts of the latter justly due, the sum of \$209.50, aside from his own debt of \$45. Schacht is insolvent, and has no property subject to execution. This plaintiff was appointed receiver of his property in proceedings supplementary to execution. The conclusion of the court was that the transfer of the note to Thonet was fraudulent as to the wife of Schacht, and that the proceeds of it in his hands were held by him subject to her right to enforce payment of

her judgment therefrom, and that the plaintiff was entitled to recover from him (Thonet) the amount of her judgment, not exceeding the amount received by him. Judgment was entered to this effect, and Thonet appeals.

For the purposes of this decision we may assume that such a transfer of the note would not be covered by any statute having the effect to avoid the same, unless it be chapter 41, § 18, Gen. St. 1878, which declares void transfers of real property made, as well as bonds or other evidences of debt given, with intent to hinder, delay, or defraud "creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands." It is said that the wife of the defendant in the pending divorce suit, in whose behalf this action is prosecuted, was not a "creditor;" that she is not within the protection of the statute; and that as to her the transfer was not voidable. This statute is founded upon that of 13 Eliz. c. 5, which included in terms "goods and chattels" with other property, transfers of which, with the specified fraudulent intent, were declared void. That statute has been held merely declaratory of a rule of the common law, and, notwithstanding the omission of the words "goods and chattels" in our enactment, the common-law rule, partially expressed therein, remains in force. The transfer of such property with the fraudulent intent specified in the statute is voidable. *Piper v. Johnston*, 12 Minn. 60, 66, (Gil. 27); *Blackman v. Wheaton*, 13 Minn. 326, (Gil. 299); *Hicks v. Stone*, 13 Minn. 434, 440, (Gil. 398); *Benton v. Snyder*, 22 Minn. 247; *Fox v. Hills*, 1 Conn. 294. The right to call in question the validity of such transfers on the ground of fraud extends to others than "creditors," in the strict sense of that term. Among the classes of "other persons" at whose instance such transfers may be avoided, because of the intent to defraud them in respect to their "lawful actions, damages, forfeitures, debts, or demands," is that of the wife prosecuting, or about to prosecute, a suit for divorce and alimony, when the husband, with intent to render ineffectual any recovery by her, transfers his property to another not a purchaser in good faith. *Twyne's Case*, 3 Coke, 80, 82a; *Livermore v. Boutelle*, 11 Gray, 217; *Morrison v. Morrison*, 49 N. H. 69; *Bailey v. Bailey*, 61 Me. 331; *Feigley v. Feigley*, 7 Md. 537; *Bouslough v. Bouslough*, 68 Pa. St. 495; *Draper v. Draper*, 68 Ill. 17; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. Rep. 616; *Boog v. Boog*, 78 Iowa, 524, 43 N. W. Rep. 515. But, irrespective of the fact that the statute applies to "other persons" besides "creditors," the wife, upon the rendition of the judgment in the pending suit, became an actual creditor; and even in this view of the case she might avoid the transfer made with intent to defraud her, for a transfer made with intent to defraud even subsequent creditors is voidable. *Livermore v. Boutelle*, supra; *Plunkett v. Plunkett*, 114

Ind. 484, 16 N. E. Rep. 612, and 17 N. E. Rep. 562.

The appellant was an active party with the husband in the accomplishment of the fraudulent purpose. The agreement to board Schacht for a year, made with the intent to defeat or render ineffectual the claim of the wife in the pending action, was a fraud upon her, condemned alike by the common law and by the statute, and, being a substantial part of the consideration for the transfer of the note, that alone rendered the transfer voidable, notwithstanding the further consideration that Thonet should pay certain debts of Schacht, much less in amount, as it seems, than the value of the property transferred. *Albee v. Webster*, 16 N. H. 362; *Morrison v. Morrison*, *supra*; *Sidensparker v. Siden-*

sparker, 52 Me. 481, 490; *Twyne's Case*, *supra*. Thonet, having actively participated in the fraud, is not entitled to protection even as to the amounts paid by him out of the proceeds of the note which he collected. The transfer to him is to be treated as void in its entirety, and he is answerable for the proceeds of the note, without deduction even on account of his own debt. *Thompson v. Bickford*, 19 Minn. 17, (Gil. 1.) The case will be seen to be distinguishable from one where the property of the debtor is appropriated wholly in payment of the debts of preferred creditors, there being reserved no benefit to himself from the transfer.

Judgment affirmed.

VANDERBURGH, J., took no part.

RINDSKOPF v. MYERS.

(57 N. W. 967, 87 Wis. 80.)

Supreme Court of Wisconsin. Jan. 30, 1894.

Appeal from circuit court, Wood county; Charles V. Bardeen, Judge.

Action by Elias Rindskopf against Henry Myers. There was judgment for defendant, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This action was brought by the plaintiff to recover the value of the greater portion of a stock of goods sold and delivered by Hyman Nathan to the plaintiff, and seized a few days thereafter under writs of attachment in the hands of the defendant, as sheriff of Clark county, in favor of Henry Benedict, a creditor of Hyman Nathan, on the ground that the sale to the plaintiff by Hyman Nathan was fraudulent and void as against his creditors. The record presents only certain alleged errors in the instructions of the court to the jury, and its refusal to give certain others, it being conceded that the evidence in the case to support a verdict for the defendant is sufficient. Facts and circumstances were given in evidence, some of which amounted to badges or indicia of fraud, properly calling for instructions on all the points hereinafter stated. The court instructed the jury, among other things, that "(1) a sale or assignment of all a man's property, when he is largely in debt, naturally excites suspicion of fraud, and is therefore evidence of fraud," and in this immediate connection added: "Or if made in unusual haste, and not in the manner in which men of ordinary care and prudence usually transact their business, or if made at greatly inadequate price, these and similar acts are badges of fraud. They are not fraud, but may be considered, when they are proven to exist, by the jury, as facts and circumstances tending to show fraud. (2) When a sale is made with intent to hinder, delay, or defraud creditors, it is void, if the party receiving or purchasing the property so sold had knowledge of such intent; but this knowledge need not be actual, positive information or notice, but may be inferred from the knowledge by the purchaser of facts and circumstances sufficient to raise such suspicions as should put him upon inquiry as to the real situation, and which, if pursued, would lead him to the truth." That, if the sale was with fraudulent intent on the part of Nathan, the jury should inquire if the plaintiff knew of such intent, "or had knowledge or notice of such facts and circumstances as to put him, as a reasonably prudent man, upon inquiry in relation thereto, and would have led to his ascertaining the truth." That if Nathan intended to defraud his creditors, and if "the circumstances, situation, and surroundings were such as to put an ordinarily prudent man on his guard, and the plaintiff had

knowledge thereof, and purposely or negligently omitted to make such inquiries as an ordinarily prudent and cautious man would have made in his situation, which inquiries, if pursued, would have led to his ascertaining the truth as to Nathan's intent, then the plaintiff cannot recover." The court refused to instruct the jury, at plaintiff's request, (1) that if the plaintiff "had no knowledge of the intent on Nathan's part, and did not participate with him in such intent, then the jury should find for the plaintiff; (2) to avoid the sale the fraudulent intent must be known to, and entertained by, both buyer and seller, and both must be connected with the fraudulent design; (3) the payment by a purchaser of a fair consideration upon a sale of property, although not conclusive, is strong evidence of the good faith of the transaction, and requires clear evidence of fraudulent intent to overcome it." On the cross-examination of Louis Rindskopf, a witness for the plaintiff, his brother, the court allowed defendant's counsel, against plaintiff's objections, to show that he (Louis) did not ask Nathan any questions as to whether he owed for his stock of goods, or was pressed by creditors; that he asked him no questions at all,—made no inquiries as to his financial condition. On the cross-examination of the plaintiff, it appeared that he had a bank book, and that it was in Milwaukee. On re-examination his counsel asked him to state the reason he had, if any, for not bringing the book. The court ruled that the reason why he did not bring it was immaterial, unless requested to bring it, and even then it might be immaterial. It appeared that no such request was made, and the court excluded the inquiry. The jury found for the defendant, and the defendant had judgment, from which the plaintiff appealed.

R. J. MacBride, for appellant, James O'Neill, for respondent.

PINNEY, J., (after stating the facts.) 1. The instruction, in substance, that the sale or assignment of all a man's property, when he is largely in debt, naturally excites suspicion of fraud, and is therefore evidence of fraud, must be considered with the context. The court had instanced this with some other like facts, saying: "This and similar acts are badges of fraud. They are not fraud, but may be considered, when they are proven to exist, by the jury, as facts and circumstances tending to show fraud." The jury were told that in this sense the particular fact or badge of fraud referred to was evidence to show fraud, but not that it was sufficient to prove it. We think the jury could not have misunderstood the purport and meaning of the charge, and that, as explained, it was correct, and is in accordance with what was held in *Bigelow v. Doolittle*, 36 Wis. 119, and *Pilling v. Otis*, 13 Wis. 553. The charge, in this and other respects, ren-

dered it unnecessary to instruct the jury that they were not to infer an intent to defraud from the mere fact that Nathan sold his entire stock to the plaintiff. The court had said, in substance, that a sale of the entire stock of one, when largely in debt, would be evidence or a badge of fraud, and that a person in failing circumstances might notwithstanding sell and convey a good title to his property. This was sufficiently clear and favorable to the plaintiff.

2. The instruction asked by the plaintiff that payment by the purchaser of a fair consideration was strong evidence of good faith, and required clear evidence of fraudulent intent to overcome it, if given, would have been a clear invasion of the province of the jury, and was therefore properly refused. The effect of evidence of payment of such consideration, as well as what evidence would or would not suffice to overcome it, were questions depending upon all the facts and circumstances in evidence bearing upon the bona fides of the sale, and were to be decided by the jury, and not by the court. *Bigelow v. Doolittle*, supra; *Lampe v. Kennedy*, 60 Wis. 110, 18 N. W. 739.

3. All other instructions excepted to, and the refusal to give those relevant to the case and not fairly embraced in the general charge, present, in substance, the single question, in somewhat varied phraseology, whether knowledge on the part of the purchaser of his vendor's intent, in making the sale, to hinder, delay, or defraud his creditors, must be actual, positive information or notice, or belief of that fact, or whether, as the court instructed, that knowledge or notice of such intent might be inferred from knowledge on the part of the purchaser of facts and circumstances sufficient to raise such suspicions as to put him, as a reasonably prudent man, upon inquiry in relation thereto, and would have led to his ascertaining the truth; that if the circumstances, situation, and surroundings were such as to put an ordinarily prudent man on his guard, and he purposely or negligently omitted to make such inquiries as an ordinarily prudent and cautious man would have made in his situation, and which, if pursued, would have led to his ascertaining the truth as to his vendor's intent, in either case, in an action such as this, it would prevent a recovery by the purchaser. The rulings of the court in the instructions given, and in refusing those asked, are certainly in accordance with the law as settled in this state nearly a quarter of a century ago, and since then frequently reiterated in clear and unmistakable terms, although a different view of the law has been and still is maintained in some of the states, in cases cited by the appellant's counsel. This conflict of decided cases is considered somewhat at length in *Wait on Fraudulent Conveyances*, (sections 374-379,) and in *Bump* on the same subject, (page 200,) where the cases on both sides are collected, and the rule applied by the cir-

cuit court, and hitherto maintained in this state, is approved. In *Avery v. Johan*, 27 Wis. 246, 247, it was held that knowledge of such facts and circumstances as raised a suspicion in the mind of the purchaser, and did or ought to have put him upon inquiry, was sufficient, so that he purchased and paid at his peril; and the rule in *Atwood v. Impson*, 20 N. J. Eq. 150, in accordance with the charge in this case, is cited with approval. The rule was laid down with added vigor and clearness in *Hopkins v. Langton*, 30 Wis. 379, 381. To the same effect is *David v. Birchard*, 53 Wis. 495, 496, 10 N. W. 557. In *Brinkman v. Jones*, 44 Wis. 498, and *Helms v. Chadbourne*, 45 Wis. 61, in relation to sales of real estate, the court said: "We think the true rule is that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase." And the conflict in the cases is noticed and considered by Mr. Justice Taylor in his opinion in the former case. The rule thus maintained was expressly approved in the circuit court of the United States for this circuit by Harlan and Bunn, J.J., in *Bartles v. Gibson*, 17 Fed. 293, and in the *Case of Holladay*, 27 Fed. 849. The question was subsequently before this court in *Hooser v. Hunt*, 65 Wis. 72, 26 N. W. 442, when many of the cases relied on by the appellant here were cited, but the court refused to reconsider the rule thus established in this state, and to which we adhere. We think the rule was fairly expressed in the general charge, and that it justified the refusal to give the instructions requested, already noticed. It is a rule applicable alike to legal and equitable actions, whether the subject of the action is personal or real estate. One about to purchase under the circumstances stated is bound to stay his hand, and if he will not the fault is wholly his own. The question of fraud, and of notice of the intent to defraud, is still a question for the jury, who, when they find the facts, are to apply the rule and declare the consequence; and we fail to see in it anything in conflict with the statute making fraud, in cases such as this, a question of fact for the jury.

4. There was no evidence in the case to warrant the submission to the jury that there was any scheme or conspiracy on the part of Stumes, Hyman Nathan, Louis Rindskopf, and the plaintiff to defraud the creditors of Nathan, or tending to such a conclusion, and there was no such suggestion in any part of the general charge, nor anything to show that any such claim had been made; and therefore the refusal to instruct the jury that there was no evidence to warrant such a finding was not prejudicial to the plaintiff, and the testimony elicited from Louis Rindskopf, against the plaintiff's objection, had

no tendency to establish any such conspiracy. We do not see any reason for saying that the plaintiff could have been injuriously affected by it.

5. As the plaintiff had not been requested by the defendant to bring his bank book to the trial, the court properly ruled that it

was wholly immaterial why he omitted to do so. No sufficient reason appears for his entering upon any explanation on the subject. It follows from these views that the judgment of the circuit court is correct, and must be affirmed. The judgment of the circuit court is affirmed.

NICHOLS v. BANCROFT et al.

(41 N. W. 891, 74 Mich. 191.)

Supreme Court of Michigan. Feb. 15, 1889.

Appeal from circuit court, St. Clair county, in chancery; CANFIELD, Judge.

Atkinson & Vance, for appellants. *Charles K. Dodge*, (*Parker & Burton*, of counsel,) for appellee.

LONG, J. The bill is filed in this cause in aid of execution. The court below made a decree, substantially as prayed in the bill, from which defendants appeal. The following is a statement of the facts, which we take largely from brief of the counsel for complainant: On March 6, 1883, a judgment in favor of the complainant was obtained in the St. Clair circuit court, against William L. Bancroft and Elgar White, for the sum of \$5,141.81, and costs taxed at \$20. Counsel for Mr. Nichols, after inquiry and search, found no property upon which to levy, belonging either to Bancroft or White; but, understanding that Mr. Bancroft was to be called as a witness in another case, wherein he was testifying as to his solvency, counsel for Mr. Nichols attended to find out whether he would testify to the ownership of property subject to levy. Mr. Bancroft in his testimony in that case did admit ownership of real estate, but could not recollect the description, and while he was yet testifying counsel hurried out to look up the description, and get a levy made, but before he could do so Mr. Bancroft finished his testimony, and put a deed on record at 11:10 A. M., conveying the land to his son, Carroll D. Bancroft, for an alleged consideration of \$400. The levy was made after the deed was filed for record, and this bill is filed in aid of the execution. The defendants claim that the deed was made in pursuance of an arrangement or bargain between them in the winter of 1882 and 1883 to repay money borrowed by Mr. Bancroft from his son, Carroll. It appears that another judgment had been obtained on notes against Stewart, Goulden, and William L. Bancroft and others, some time previous. Stewart was the only responsible defendant in that judgment, and had paid it in full. He then began a suit in equity to compel Goulden to pay a moiety of the judgment. Stewart deceased before the hearing. It was in this case that William L. Bancroft was called as a witness to show his solvency or insolvency. Counsel for complainant claims that, if he had been solvent at the time the suit in equity was begun by Stewart against Goulden, his testimony to that effect would have tended to defeat the case, and that his testimony in that case did tend to show his solvency at the time the suit was begun, and at the time he was testifying. It was at this time that counsel for Mr. Nichols attended to find out whether, in his testimony, Bancroft would admit of present ownership of property subject to levy. Mr. Bancroft was called to testify in the case

of *Stewart v. Goulden*, about 10 o'clock A. M., March 13, 1883. He testified to present ownership of 12½ acres of land on section 1 of the township of Wales, St. Clair county, but could not recollect the description. He said he owned it, and that the title was in him. Counsel for Mr. Nichols, who heard the testimony, immediately left the court to get a levy upon the land in the case of *Nichols v. Bancroft and White*. Mr. Dodge, counsel for Mr. Nichols, went some 30 rods, or a little more, to the abstract office, to look up the description, and returned to the courthouse, when he found that Mr. Bancroft had finished his testimony, and put the deed on record to his son. Mr. Bancroft says that this deed was not executed until after he gave his testimony in the *Stewart Case*; that, after giving his testimony, he went to his office, executed the deed, and his son, Carroll, took it to the register's office, and put it on record. The testimony shows that the distance from the court-house to his office and return was about one-half a mile. The deed was in Mr. Bancroft's handwriting, and was acknowledged on that day. It is admitted that Mr. Bancroft and his son, Carroll, were in Port Huron several days before this deed was given, and before Mr. Bancroft gave his testimony in the *Stewart Case*, and remained there several days after that. Mr. Bancroft, in his testimony in the present case, says that he had bargained this land away to his son, Carroll, some three months before he gave his testimony in the *Stewart Case*, and for the consideration of \$400, then agreed upon, but that the deed was not then made out, because he did not then have the description; that this deed was to be made in consideration of the \$400, which he had before that time borrowed of his son, Carroll.

Counsel for complainant now contends that the foregoing facts show beyond question that the story of William L. Bancroft and his son about borrowing money, and an agreement to deed the land in question in payment thereof, was purely an after-thought,—a story made up to suit the circumstances of the case as well as might be; that there was a concerted action between the two defendants to defeat the plaintiff's claim, by conveying the property in such a way that it could not be levied upon; and that this was done for the express purpose of defrauding the creditors of the defendant. There is no contention but what the deed in question was placed upon record before the levy was made. The foregoing circumstances, in substance, are about all the claims set forth by the pleadings, and in the proofs upon which complainant relies to set aside this deed, except that William L. Bancroft, as is shown, had an order on the bank at Port Huron, dated in February or March, 1883, signed by Carroll, by which he was authorized to draw any money from the bank standing in Carroll's name on a certain book numbered 1,687, and that the testimony of the defendants is not to be believed. The two defendants

were examined as witnesses on the hearing of the case in the court below.

The testimony of the defendant Carroll D. Bancroft was taken by commissioner at Hot Springs, Ark. He testifies, in answer to interrogations put to him, that his father, William L. Bancroft, was indebted to him in the sum of about \$800. The sum of \$600 was for cash loaned to his father on February 11, 1882, and the balance for cash sent him from Florida, and that on March 13, 1883, he received a deed from his father of a piece of land in the town of Wales, St. Clair county, known as the "Railroad Sand Pit." That he was present when the deed was executed and acknowledged, having himself requested Charles D. Thompson, a notary in and for said county, to take the acknowledgment; and that the deed was delivered to him by William L. Bancroft. That he took the deed himself to the office of the register of deeds of St. Clair county, and had it recorded. That the consideration for the deed was the money had of him by his father, as before stated; and that the deed was given in pursuance of a previous understanding with his father at Hot Springs, Ark., in the winter of 1882 and 1883. That the first he knew of the judgment of Edwin C. Nichols against William L. Bancroft and Edgar White was when he was called upon to answer the complaint filed in this cause. On his cross-examination he stated that on March 13, 1883, at the time the deed was executed, his mother was at Hot Springs, Ark. That the money loaned his father was partly money he received from his mother, and partly from his own earnings. That he had money and property which, prior to March 13, 1883, he had earned partly in Port Huron and partly in Hot Springs, as a teacher of languages, as a clerk, and in the profession of music. Witness further says that he received in 1880 or 1881 a quarter interest in the Arctic Ice Company of Jacksonville, Fla., valued at \$4,000, as a gift from his mother. That the deed in question has been in his possession ever since it was recorded, and was delivered to him by his father on the day of its execution, some time before dinner, and that he took it at once to the office to have it recorded, and gave it personally to the register of deeds. In answer to a cross-interrogatory put to him, as to the circumstances under which the deed was to be given, the witness testified that there was an agreement between his father and himself in regard to deeding him the land in question. That it was made at their house, in Hot Springs, Ark., in the winter of 1882 and 1883; and it was that he should have the deed when they went north in the spring, and could get the description. That his father said it was good for a ballast pit, and would soon be worth something, as the C. & G. T. Railroad would soon be compelled to set up their track again, and he thought it was worth \$400. That it was a verbal, but distinct, agreement between them, as to the matter, and he believed it

was worth that amount. That it was the desire of his father to give him something for the money he had from him, as he had not the money to pay him, and he agreed to take the land at that price. That his mother did not sign the deed, because she was not there. This testimony of Carroll D. Bancroft is fully corroborated by the testimony of his father, William L. Bancroft. On his cross-examination, Mr. William L. Bancroft was asked: "Was not the fact that that piece of property might be levied upon, being the only one held in your name in this county, the reason of your putting that deed on record at that particular time?" *Answer.* My recollection is that it was not the only piece of property I had. I think the record would show to-day that I transferred an interest. I quitclaimed an interest in a forty-acre lot (I would not be positive about the date) since that time. As to your question, I will say, no; I did not put it on record. *Question.* Was not that the reason of your executing it at that particular time? *A.* I have not the slightest recollection of thinking that there was any trouble impending to me in the Stewart Case at all, while in regard to the Nichols Case it had actually not come to my knowledge that a judgment had been taken there. You see I was not here when that judgment was taken." Mr. Charles D. Thompson was called as a witness by defendants, and testified that he is assistant cashier of the Port Huron Savings Bank, and that on February 11, 1882, a check was drawn in favor of William L. Bancroft on their bank for \$600 on C. D. Bancroft's savings account; that Mr. W. L. Bancroft at that time had a written order from Carroll to draw on that fund; that at the time this check was drawn the fund was \$671.88, and on deposit since that in that fund was \$2,329.64 in Carroll Bancroft's name; that this account commenced back in 1875, with a deposit of \$2; up to January, 1877, the total amount of deposit was \$339.96; from 1879 to 1881 the total deposit was \$599; up to April, 1882, he deposited \$3,001.52; in April and May, 1882, he deposited about \$1,100; from that time down to October, 1885, it figured up to \$9,500, when the account closes; and that, so far as the bank knew, there was no one interested in this account except Carroll D. Bancroft; that drafts were drawn right along from time to time on this account, so that at no time was there a very large balance; but that, as Carroll grew older, the account grew longer, till it closed.

This testimony stands upon this record wholly uncontradicted, except by the circumstances before set out, and these circumstances counsel for complainant contents should outweigh the positive statements of Carroll, corroborated by his father and Mr. Charles D. Thompson. We find nothing in the record to contradict the fact that on February 11, 1882, the check was drawn for \$600 against the fund belonging to Carroll, then in the bank, and that William L. Bancroft had

the money. Mr. Thompson testified to this. The bank-books show the fact. Carroll swears that it was paid, and that it was his money; and he gives an explanation as to how he became possessed of it. Carroll further testifies that it was in consideration of this that his father agreed to deed him this land; and that on March 13, 1883, in pursuance of such agreement, the deed was so made and delivered to him, and he placed it on record. To meet this testimony the complainant says that William L. Bancroft, having in the forenoon of March 13, 1883, testified in the Stewart Case that he was then the owner of the identical piece of property, and having at once, after giving his testimony, gone to his office, and made and delivered this deed to Carroll, it is evidence of an intent to defraud the complainant and his other creditors. If this fact were conceded, it would not, standing alone, destroy the validity of this deed. Something further must be found. The court must not only be satisfied that the deed was

made with intent to hinder, delay, or to defraud creditors, but that the deed was not actually made to pay a debt justly due. The burden was upon the complainant to prove this fact. It not only is not proven, but the testimony, we think, shows very clearly that William L. Bancroft was indebted to Carroll in the amount claimed. Where property goes to pay an honest debt, that use of it is lawful, although it may cut off the redress of all others, and although intended to do so. We think the testimony upon the part of the complainant falls far short of making a case upon which a court of equity would be justified in setting aside this deed, and, when we take the case made by the defendants' proofs, we are satisfied that Carroll took this deed in payment of a *bona fide* debt then due him from his father. The decree of the court below must be set aside, and decree entered in this court dismissing complainant's bill, with costs of both courts. The other justices concurred.

WILSON v. SPEAR et ux.

(34 Atl. 429.)

Supreme Court of Vermont. Windsor. Sept. 20, 1895.

Appeal in chancery, Windsor county; Thompson, Chancellor.

Bill by James J. Wilson against George J. Spear and wife to have a voluntary conveyance by him to the wife set aside as in fraud of creditors. From a decree for plaintiff, defendants appeal. Reversed.

French & Southgate, for appellants. J. J. Wilson, pro se.

MUNSON, J. On the 28th of November, 1885, the defendant George J. Spear received from one Parkhurst a deed of one undivided half of his farm. In the fall of 1887 said Spear purchased the other undivided half of the farm, and had Parkhurst convey it to his wife, the defendant Eva B. Spear. The consideration for both conveyances was paid by George J. Spear from his own means. On the 31st day of December, 1887, George J. Spear executed to one Beach a deed of the undivided half conveyed him by Parkhurst, and on the 16th day of January, 1888, Beach conveyed the same to Eva B. Spear. The master finds that the defendant George had this property conveyed to his wife, the defendant Eva, "for the reason that he thought the same would be safer in her hands than in his own, from attachment by his creditors," of whom the orator was one. This is a sufficient finding that the transfer was made with intent to defraud the orator. There is no finding that connects the defendant Eva with the fraudulent purpose of her husband. Upon the question of consideration, the master says he is "unable to find" that the defendant Eva paid anything for the farm,—which cannot, of itself, be treated as an affirmative finding that nothing was paid. But, as the master says in this connection that the defendant husband had the same conveyed to his wife to keep it from his creditors, it is thought by a majority of the court that the payment of a consideration is fairly negatived. The master also reports certain facts in regard to the grantor's indebtedness and unconveyed property which it will not be necessary to consider. It appears that a part of the orator's account accrued after the conveyances were made, but the case will first be considered as if the entire demand were pre-existing. We have, then, the case of a voluntary conveyance, executed with an actual intent to defraud an existing creditor, to be passed upon without reference to the amount and availability of the property retained.

In disposing of the question stated, it seems desirable to make some reference to the cases, in view of the frequent failure to distinguish carefully between fraudulent conveyances upon consideration, and conveyances without consideration, and, in the case of voluntary conveyances, between those

which rest upon a legal inference of fraud, and those where an actual fraudulent intent is shown. When the conveyance is without valuable consideration, the creditor may avoid it for the fraud of the grantor alone. *Foster v. Foster*, 56 Vt. 540, 548. It is only when there is a valuable consideration that fraud on the part of the grantee is essential. Such were the cases of *Root v. Reynolds*, 32 Vt. 139; *Leach v. Francis*, 41 Vt. 679; *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153. The fraud of a voluntary grantor may be an actual fraudulent purpose, or the fraud which the law imputes to him from the condition of his estate and the necessary consequence of his act. When the grantor is found to have conveyed for the express purpose of defrauding his creditors, the condition of his estate is immaterial. *Wadsworth v. Williams*, 100 Mass. 126; *Hager v. Shindler*, 29 Cal. 47; *Westerman v. Westerman*, 25 Ohio St. 509; *Gormley v. Potter*, 29 Ohio St. 597; *Vasser v. Henderson*, 40 Miss. 519; *Edmunds v. Mister*, 58 Miss. 765. It is only in cases where no actual fraud appears that the conveyance can be sustained on the ground that the grantor retained sufficient property to satisfy his debts. Of this character were the cases of *Brackett v. Wait*, 4 Vt. 389; *Dewey v. Long*, 25 Vt. 564; *Church v. Chapin*, 35 Vt. 223; *Wilbur v. Nichols*, 61 Vt. 432, 18 Atl. 154. It appears, then, that the orator, as an antecedent creditor, can avoid these conveyances without other findings than that they were designed by the grantor to defraud his creditors, and were without consideration.

Upon the facts reported, the disposition of the case is not affected by the finding that a part of the account was for services rendered after the conveyances were made. The charges were for the orator's services and disbursements as attorney in a single suit. If the conveyance was designed to defraud the orator, it was an attempt to defeat the collection of his compensation for a continuing service, rendered and to be rendered under an employment already given. It is possible that in a case of this character the entire account should be treated as pre-existing. If this would not be permissible, there is authority for saying that the orator could have relief, to the extent of the pre-existing charges, notwithstanding the judgment was for more. *Henderson v. Henderson*, 133 Pa. St. 399, 19 Atl. 424. It has been held, however, that one who takes a judgment covering both antecedent and subsequent claims must be treated as a subsequent creditor as to all. *Usher v. Hazeltine*, 5 Greenl. 471. But, if enough appears to avoid the conveyance as to subsequent creditors, it will not be necessary to consider the questions suggested. It is said in *McLane v. Johnson*, 43 Vt. 48, that a conveyance without consideration, and with fraudulent intent, is invalid as to both existing and subsequent creditors. But that was a case in which the fraudulent

intent existed in both grantor and grantee. It is by no means universally conceded that a voluntary conveyance to an innocent grantee, void as to existing creditors, is necessarily void as to all subsequent creditors. *Hagerman v. Buchanan* (N. J. Err. & App.) 14 Am. St. Rep. 759, note, 17 Atl. 946. But a consideration of this question will be unnecessary, if it sufficiently appears that there was an actual intent to prevent the collection of the grantor's subsequent account. In view of the character of the claim, the finding of an intent to defraud the orator must be held to apply to both parts of his demand. We have, then, a finding of an intent to defraud the orator as a subsequent creditor. A voluntary conveyance, made with an intent on the part of the grantor to defraud subsequent creditors, is void as to such creditors, without proof of fraud on the part of the grantee. *Laughton v. Harden*, 68 Me. 208. And, there having been this actual intent to defraud the orator of his claim for the services to be thereafter rendered, the deed would be void as against such claim, notwithstanding the possession of other property. Nor is a different disposition of the case required by the fact that the conveyance was to the grantor's wife. It is true that a voluntary conveyance to wife or child, which does not impair the grantor's ability to pay his existing debts, and is without fraudulent design, will be sustained. *Brackett v. Wait*, 4 Vt. 389; *Jones v. Clifton*, 101 U. S. 225. But a deed executed in actual fraud cannot be sustained on the ground that the grantee is one whom it is the grantor's duty to provide for. These conveyances were not designed to effect a settlement, but to perpetrate a fraud. The findings are inconsistent with the theory of a gift to the wife. The property was transferred to the wife because the husband thought it would be safer in her name. The actual fraudulent purpose vitiates the conveyance, notwithstanding the grantor's possession of other property, the innocence of the grantee, and the consideration of affection.

The finding that George J. Spear had the farm conveyed to his wife is regarded by a majority of the court as being, in effect, a finding that Beach took his deed of an undivided half merely to enable Spear to transfer it to his wife, and that in conveying to Mrs. Spear he passed the title as it was received. This being so, Beach is not a necessary party to a proceeding to set aside his deed from Spear, and the half which Mrs. Spear obtained through him can be reached as the case stands. *Day v. Cummings*, 19 Vt. 496. But the orator can have no relief as regards the half which Mrs. Spear received by and from Parkhurst, in a proceeding to which Parkhurst is not a party. An avoidance of her deed of this half would leave the property in Parkhurst, and the orator cannot avoid her title to a share which he is not in a position to obtain. This will require a reversal of the decree.

The orator's proceedings at law are clearly sufficient to entitle him to equitable relief. The levy of execution is not defective in the particulars complained of. The officer's return shows a compliance with the requirements of the statute regarding notice and adjournment of sale. The return is evidence that the newspaper in which the notice was published was one of general circulation in the vicinity. We think counsel are incorrect in saying that this is not within the rule laid down in *Swift v. Cobb*, 10 Vt. 282. It was the officer's duty to publish the notice in a newspaper of a certain description. His return is evidence, not only that he published it in the paper named, but that the paper was such as the statute prescribed.

The failure of the officer to deliver a deed of the property until long after the expiration of the time limited for redemption, and until after the bringing of this bill, is not a bar to the orator's relief. The deed is to be given effect from the time when it should have been delivered. It is well settled that the doctrine of relation will be applied to sustain the title of the purchaser at an execution sale. *Jackson v. Ramsay*, 3 Cow. 75, 15 Am. Dec. 242, and note. The case cited was an ejectment suit, in which the defendant relied upon a sheriff's deed executed after the action was commenced and issue joined therein; and it was held that the deed had relation to the time of sale, and that the defendant could avail himself of it without pleading it as a matter of defense arising after issue joined.

The fact that the term of office during which the sale was made expired before the deed was executed does not render it invalid. Counsel have not referred to R. L. § 860, and its application to this question need not be considered. It is certain that an express statutory provision is not necessary to secure the complete execution of process which is being served by an officer when his term expires. In the case of a levy upon personal property, it is universally held that the service is to be completed by the officer who made the levy, notwithstanding the close of his term. It is generally considered that this rule of the common law is applicable to the service of executions under statutory provisions for the sale of real estate, but some authorities hold that in the case of real estate the service must be completed by the new incumbent. *Tukey v. Smith*, 36 Am. Dec. 705, note. The giving of a deed for land sold while in office is a part of the execution of the process, which may be done after the expiration of the term. *Allen v. Trimble*, 4 Bibb. 21. It is not necessary to determine here whether the acts required after the expiration of the term should be done by the former officer, or by his successor; for in this case the deed was given by the same person who made the sale, while he was filling the same office by virtue of a reappointment. Decree reversed, and cause remanded, with mandate.

BRESNAHAN v. NUGENT.

(52 N. W. 735, 92 Mich. 76.)

Supreme Court of Michigan, June 10, 1892.

Error to circuit court, Kent county; Allen C. Adsit, Judge.

Action by John Bresnahan, administrator of the estate of Daniel Nugent, deceased, against Emanuel Nugent, under How. St. §§ 5884, 5885, to recover for the benefit of decedent's creditors for certain personal property fraudulently transferred by decedent to defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Taggart, Wolcott & Ganson, for appellant. J. H. Tatem and James Nugent, for appellee.

MONTGOMERY, J. On the 29th of April, 1879, Daniel Nugent, by bill of sale, transferred all his personal property to his brother Emanuel Nugent, the defendant, and immediately left the state. Daniel was last heard from in September, 1879, and after the lapse of seven years from that time letters of administration were issued to the plaintiff. James Nugent presented claims which were allowed against the estate, as follows: First, a joint note made by James and Daniel Nugent to John Nugent, dated April 8, 1876, and payable one year from date, for \$191, less indorsements; second, two notes for \$150 and \$300, respectively, each bearing date September 11, 1878, and payable to Mary Nugent or bearer, and due three years from date with interest; third, one note for \$400, given to Mary Nugent, of the same date, and payable five years from date, with interest; fourth, a claim for support of Mary Nugent and Cecelia Nugent, mother and sister of Daniel Nugent, amounting to \$694.58, with interest, which support Daniel Nugent had agreed to furnish by contract with Mary Nugent, which contract was by her assigned to James. No property came into the hands of the administrator, and this suit is brought under sections 5884 and 5885 of Howell's Statutes, under a claim that the personal property transferred to Emanuel was so transferred in fraud of creditors. The plaintiff recovered a judgment of \$3,052.29, and defendant brings error.

1. The plaintiff described, in the first count of his declaration, the personal property claimed to have been transferred, including in the description 953 bushels of wheat. He also appended the common counts for goods sold and delivered and the money counts, but nowhere alleged any transfer of real property. The plaintiff was permitted to show that at about the same date as the transfer of the personalty a deed of lands upon which wheat was standing growing was made, and that it afterwards harvested and threshed out 953 bushels or thereabouts. This was error. The conveyance of the land was confessedly good as against Daniel, and the wheat growing upon the land passed by the conveyance. The pleadings in this case did not apprise the

defendant of any attempt to attack such conveyance, even if it were possible to treat the wheat as personal property belonging to Daniel, without first setting aside the conveyance,—a question not involved, and which we do not decide. But if the product of the land could be thus treated for this year it might with equal propriety be open to the plaintiff to reap the benefit of all crops since grown upon the land, without regard to the labor involved in producing them.

2. A portion of the property transferred was exempt. The recovery did not exclude this. This is error. It has been frequently held that a creditor cannot complain of any disposition which a debtor sees fit to make of exempt property. *Buckley v. Wheeler*, 52 Mich. 1, 17 N. W. 216; *Fischer v. McIntyre*, 66 Mich. 681, 33 N. W. 762; *Freeding v. Bresnahan*, 61 Mich. 549, 28 N. W. 531.

3. Complaint is justly made of testimony which related to family jars subsequent to the purchase, and of testimony relating to defendant's treatment of his sisters. These transactions had no bearing upon the issue here involved. Without referring to the numerous objections in detail, one may be stated by way of illustration. Joseph Nugent, who resides in Iowa, came to Michigan in March, 1880, and was permitted to testify that he "found all the connections were in a hostile camp; Emanuel on one side alone, and the family and all the connections on the other side." This was not only irrelevant, but well calculated to prejudice the jury.

4. Mary Nugent, in her lifetime, brought suit against Daniel, and attached a portion of the personal property transferred. Emanuel brought replevin against the sheriff, and James, as assignee of his mother, defended the suit on the ground that the bill of sale, as against Daniel's creditors, was fraudulent. This defense prevailed, and the jury found specially that such transfer was fraudulent as against the creditors of Daniel. The circuit judge charged the jury, in effect, that this judgment, rendered between privies of the parties to this suit, was conclusive as to the fact of the fraudulent character of the transfer. Complaint is made of this ruling, but we think it right. The question is not whether defendant would be concluded as to all questions which might have been tried, as was contended in *Jacobson v. Miller*, 41 Mich. 90, 1 N. W. 1013, but in this case the question of fraud was in fact tried, and it was precisely the same question as is here involved, and between the privies of the parties here before the court. *Barker v. Cleveland*, 19 Mich. 230.

5. The defendant also relied on the statute of limitations, but the circuit judge disallowed the defense. The question, as it arises on this record, is novel. Any action of Daniel against Emanuel would, of course, be barred; but does it follow that an action by or for the use of the creditors is likewise barred? In this case to so hold would be to exclude the creditor from all remedy. The right of

action in favor of the creditor does not accrue until the maturity of the obligations against Daniel, which, in the case of one of the notes, was not until 1883, and, in case of the assigned claim for support, until 1884; but not only is this true, but it is also true that the creditor could not by the ordinary process attack such transfer until a judgment had been obtained against Daniel, so that to hold that this right of action is barred is to hold that the action may be barred before the statute begins to run. It is suggested that the defendant might have been charged as a garnishee in a suit against Daniel. This, it is true, might have been done after the maturity of the claims if the plaintiff was able to make the statutory affidavit, but, so far as the relation of defendant is concerned, he would in no sense be a defendant in an action of trover, on the case, or in assumpsit, and therefore not within the protection of the statute, (section 8713.) The fact that in such action by ancillary proceedings an attempt might be made to charge the defendant as a trustee, and his oath taken, and proceedings had upon them, does not constitute such suit an action of assumpsit, replevin, or trover against him within the meaning of this statute.

6. In 1883, Mary Nugent joined with others in filing a bill against Emanuel, alleging that this property was conveyed by Daniel in trust for his creditors. This bill was demurred to, and dismissed without prejudice. It is now claimed that this estops James, who is in privity with Mary, from attacking the conveyance as fraudulent, but we think this position is not tenable. There was no declared trust, and none recognized by Emanuel, and, as it now appears that the transfer was fraudulent as to creditors, it is conclusive also that there was no trust which could be enforced by a bill in equity by those who are not judgment creditors. It is suggested that, as this claim of estoppel does not appear to have been litigated in the replevin suit, the estoppel of that judgment as to this question extends only to the subject-matter therein involved; but this contention ignores the fact that the finding in that case established conclusively that the transfer of this personal property was fraudulent, and made under such circumstances that one not a judgment creditor could have no remedy by a bill in equity. An ineffectual attempt to enforce a claim which has no legal existence does not estop a party from thereafter asserting one which is valid. *Rodman v. Railroad Co.*, 59 Mich. 395, 26 N. W. 651; *Detroit v. Houghton*, 42 Mich. 459, 4 N. W. 171, 287. For the errors pointed out the judgment below should be reversed, and a new trial ordered.

LONG, J., concurred with MONTGOMERY, J.

McGRATH, J. In April, 1879, Daniel Nugent conveyed to the defendant, his brother, a farm of 200 acres of land, with growing crops,

and the stock, farm implements, and other personal property thereon, and soon after left the state, and never returned. Daniel was indebted at the time of his departure, upon three notes, amounting to \$850, dated September 11, 1878, two of them running three years, and one payable in five years; and upon one note, amounting to \$191, dated April 6, 1876, payable one year from date, upon which \$45 had been paid September 15, 1877. He was under other obligations for the care and support of his mother and sister. These notes and obligations were subsequently, in August, 1884, assigned to James Nugent. Daniel was heard from after his departure, but a period of seven years elapsed after he was last heard from, and in May, 1888, letters of administration were taken out upon his estate. Commissioners on claims were appointed, and James Nugent presented and had allowed claims aggregating nearly \$2,500 on the notes and obligations aforesaid. The administrator was appointed in 1886 or 1887, and in October, 1890, he brought assumpsit under How. Ann. St. § 5884, alleging the sale, transfer, and delivery in April, 1879, of the personal property by Daniel Nugent to defendant, its disposition, a deficiency of assets, and that the sale made to defendant was without consideration, and was made with intent to defraud creditors.

Defendant set up the statute of limitations. How. Ann. St. § 5884, is as follows: "When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall, in his lifetime, have conveyed any real estate, or any right or interest therein, with the intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty to, commence and prosecute to final judgment any proper action or suit, at law or in chancery, for the recovery of the same, and may recover, for the benefit of the creditors, all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover for all goods, chattels, rights, or credits which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance." The statute provides that all actions of assumpsit, all actions of replevin or trover, and all other actions for taking and detaining goods and chattels, shall be commenced within six years after the cause of action shall accrue, and not afterwards. *Id.* § 8713. The present action is predicated upon a fraudulent conveyance of the personal property to defendant in April, 1879. It is to recover the amount of four notes, one of which matured in 1877, eleven years before Daniel Nugent's death, and thirteen years before the commencement of this suit; two of which matured in 1881, seven years before Daniel's death, and nine years before this suit was commenced; and one of

which matured in 1883, five years before Daniel's death, and seven years before this suit was commenced; and also upon a claim for the care and support of the mother and sister, the last item of which is dated August 16, 1884. It is unnecessary, in the present case, to determine whether or not the statute commenced to run in favor of defendant from the time of the conveyance or conversion, for here more than six years elapsed after all the claims against Daniel matured before this suit was brought. The statute makes conveyances with intent to defraud creditors voidable at the instance of creditors. For more than six years no attack was made upon the conveyance of the property, the recovery of the value of which is here sought. It is immaterial whether a promise or trust be implied. The statute runs against an implied, as well as an express, promise; and where a trust is created by implication of law the statute commences to run from the repudiation of the trust. The statute certainly commenced to run in favor of defendant and against the creditors at the time that the maturity of their debts placed them in a position to follow the property. The absence or death of Daniel Nugent did not interrupt the running of the statute in favor of defendant. A cause of action may accrue against one absent from the state, but by virtue of express provisions the statute does not operate until his return. A cause of action may accrue after the death of either party, but because the statute so provides the time does not begin to run until the appointment of an administrator. Suits may be commenced in such cases, not because the cause of action did not accrue until the disability was removed, but because the period is expressly extended beyond the disability. 7 Am. & Eng. Enc. Law, p. 376, and cases cited. Here, Daniel's absence and death kept alive the claim of the creditors as against him and his estate, but the absence of Daniel did not defer the accrual of the right of action in favor of the creditors, and the death of Daniel did not toll the statute as against defendant, because such a case is not within the statute. The statute, being general, must operate upon all cases which are not exempted by express exemption. 4 Bac. Abr. 475. After the right of action once attached, and the statute had commenced to run against the creditors, if the death of Daniel Nugent in any wise affected their ability to pursue their remedy, that was a disability not within the contemplation of the statute, and the statute continued to run notwithstanding. Ten Eyck v. Wing, 1 Mich. 40-46.

Section 5884 provides for the bringing of any proper action or suit. It cannot be contended that it was the intention of the legislature to revive rights of action in favor of creditors, which have been barred by the statute of limitations. The creditors might have proceeded under chapter 277, How, Ann. St. §§ 8087-8089; in trover or assumpsit for the property in question. This statute, like

all others empowering executors or administrators to bring suits, must be construed with reference to other statutes relating to actions, rights of action, and remedies. The construction contended for would defeat the very purpose of statutes of repose by enabling an administrator to revive actions against which the statute had run, and to bring trover for a conversion happening half a century before the commencement of suit. Certain rights of action survive to executors and administrators in favor of the estate, but only those against which the statute had not run. This statute gives to them certain rights of action in favor of creditors, but it cannot be construed as giving them a right of action in favor of a creditor where the full period of the statute has run in favor of the person sought to be charged and against the creditor. As is said by Campbell, J., in *Blake v. Hubbard*, 45 Mich. 1, 4, 7 N. W. 204: "The decisions on the subject of frauds against creditors do not hold fraudulent assignments so absolutely void that the parties may not lose their right of complaint by waiver or acquiescence." In *Fearey v. Cummings*, 41 Mich. 376-384, 1 N. W. 546, it is said that section 8091¹ is confined to titles and conveyances of such property as the garnishees have in possession at the time of making the affidavit. Upon examination of the record in that case it appears that the garnishees had taken a chattel mortgage upon a stock of goods, but had not filed it until the day upon which they took possession; but they claimed that the possession which they took was not, in fact, under the mortgage, but by virtue of a parol understanding under which the debtor voluntarily turned over the goods to them to enable them to make their debt. They insisted that such voluntary delivery of the goods was but a preference. In the brief of counsel for garnishees the point is made that, in order to bring the case under the section named, the garnishees must be holding under the void title at the time of the garnishment. Upon the second trial a recovery was had against the garnishees, and the judgment was affirmed, (44 Mich. 39, 6 N. W. 98,) although at the time of the commencement of the garnishee proceedings the stock of goods had been sold, and was not in the possession of the garnishees; *Graves, J.*, who wrote this opinion in the first case, dissenting.

It appears that in 1883 Mary Nugent commenced suit on certain of the notes by attachment running against the real estate, and recovered judgment in February, 1883; that she then filed her bill against Daniel Nugent and defendant in aid of this levy, but in

¹ How, Ann. St. § 8091, provides that, "if any person garnished shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to the creditors of the defendant, he may be adjudged liable as garnishee on account of such property, although the principal defendant could not have maintained an action therefor against him."

April, 1888, the proceedings were held defective, and were set aside. In May, 1888, application was made for the appointment of an administrator, and it is insisted that under How, St. § 8723, this right of action has been thereby kept alive. That was a proceeding to subject the real estate to the payment of a claim by virtue of an attachment. This is an action for the recovery of the value of personal property. Not only is the form of action distinct, but the subject-matter is different. The plea of the statute should be held good, and the judgment reversed, with costs of both courts to defendant.

GRANT, J., concurred with McGRATH, J.

MORSE, C. J. In this case I do not fully agree with either of the opinions filed by Justices McGRATH and MONTGOMERY. As to the note of \$191, dated April 8, 1876, made by James and Daniel Nugent to John Nugent, and due in one year, the statute of limitations had begun to run against Daniel before he left the state, and it was therefore in a shape to take proceedings against Daniel when the transfer was made to Emanuel. Neither in law nor equity is there any reason why Emanuel, who has never been out of the jurisdiction of the courts of this state, should now be proceeded against for the amount of this note, 11 years after his alleged fraudulent dealings with Daniel. And I agree with Justice McGRATH that the notes maturing in 1881—seven years before Daniel's death—are covered by the statute of limitations, but as to the note maturing in 1883, and the claim for support, which accrued in 1884, the statute of limitations, as against Daniel, was postponed for a period until the appointment of an administrator, and two years thereafter; and I think also as against Emanuel. How, Ann. St. § 8722. Bresnahan was appointed administrator July 19, 1888, but appeal was taken to the circuit court by Emanuel, and in that court the order of the probate court appointing an administrator was set aside. James appealed the matter to this court, where the order of the probate court was affirmed November 8, 1889. The administrator was therefore not appointed until the decision of this court, and the suit was commenced against Emanuel within two years from that date. While Daniel was living and absent

from the state Emanuel could have been proceeded against as garnishee of Daniel under sections 8087-8091, How, Ann. St., and the action in such case as against Emanuel, the garnishee defendant, would have been in assumpsit or trover. Therefore, if the creditor allowed his claim against Daniel, upon which he bases his action against Emanuel, to sleep for six years after its maturity, he has lost such right of action because of the statute of limitations. But he would have the right to commence his action at any time within six years; and as, in order to reach Emanuel, he must make Daniel a party to the suit or garnishee proceedings, it follows that, as to the notes and claims which had not run six years from maturity before Daniel's death, the creditors could not proceed until an administrator was appointed, and then I think they would be entitled to the two additional years provided by statute against Emanuel as well as Daniel's estate.

It was said by Justice Graves in *Fearey v. Cummings*, at page 384, 41 Mich., and page 80, 1 N. W., that the right given by section 8091, How, Ann. St., to assail conveyances set up by garnishees on the ground of being fraudulent as against creditors, is confined to conveyances of property then in the hands of the garnishee at the time of commencement of the garnishee suit, and did not apply where the property had been fraudulently received by such garnishee, but disposed of before suit. I think this language evidently refers to property passing into the hands of the garnishee, and then being disposed of, passing out to another or to the original owner, and not to a case where it is shown that, although the garnishee has disposed of the property before action commenced against him, he still has the avails of such property in his own hands, or has converted the proceeds of the sale of it to his own use. In such case he has money and effects in his hands belonging to the creditors of the principal defendant, and the words "any of the property aforesaid," used in section 8091, refer not simply to property in its restricted sense of goods and chattels, but to money as well, which is property in the largest and proper sense of the word. In my opinion, the statute of limitations has run against the notes falling due over six years before the death of Daniel. I therefore concur in the reversal of the judgment.

NASH v. STEVENS et ux.

(65 N. W. 825.)

Supreme Court of Iowa. Jan. 22, 1896.

Appeal from district court, Sac county; Charles D. Goldsmith, Judge.

Action in equity to subject land to the payment of a judgment. There was a hearing on the merits, and a decree for the defendants. The plaintiff appeals. Affirmed.

R. M. Hunter, for appellant. S. M. Elwood, for appellees.

ROBINSON, J. On and before the 1st day of June, 1875, the defendant Benjamin Stevens was indebted to the plaintiff in the sum of \$200. In August, 1875, the plaintiff commenced in the district court of Tama county an action on the indebtedness, to recover the amount due, and in February, 1877, he recovered against Stevens judgment for \$200 and costs. On the 19th day of June, 1875, Stevens purchased an improved farm, of 160 acres, situated in Tama county, for the agreed consideration of \$2,400. In payment he gave a note for \$600 made by himself and a surety, and notes for the aggregate sum of \$1,800, secured by a mortgage on the land. Three days after the action against Stevens on the indebtedness stated was commenced, and before he had paid any part of the purchase price of the land, he conveyed it to his wife and codefendant, Maggie Stevens, by a deed which was duly recorded on the following day. The deed recited a consideration of \$600, and was subject to the mortgage of \$1,800. Mrs. Stevens paid nothing for the land at that time, but assumed the payment of the notes her husband had given for it. In the year 1876 she sold the north half of the quarter section for \$1,000, which she applied on the mortgage debt. In the year 1882 she sold the remainder of the land, and purchased a farm of 120 acres in Sac county, of which 40 acres were broken. Improvements have been made on that, and it has been occupied by the defendants as a home since the spring of 1883. The judgment rendered against Stevens in February, 1877, is unpaid, and this action was commenced in September, 1891, to subject the Sac county land to the payment of the judgment.

The plaintiff contends that the consideration for the Tama county land was really furnished by Stevens, and that his conveyance to his wife was made to hinder and delay his creditors, and was therefore fraudulent, and that the title to the Sac county land was taken in the name of the wife for the same purpose, but that it was purchased with the proceeds of the Tama county land, and should be subjected to the payment of the plaintiff's judgment, and a decree to that effect is asked. The defendants claim that the wife paid for the Tama county land its full value, that there is no ground for granting

the relief for which the plaintiff asks, and that the action is barred by the statute of limitations. The defense last stated is the only one we find it necessary to consider. The plaintiff insists that it was not sufficiently pleaded, but we are of the opinion that it was, especially in the absence of objection made in the district court. Actions in equity for relief on the ground of fraud are barred in five years after the fraud is discovered. Code, §§ 2529(4), 2530. The law does not contemplate actual knowledge of the fraud before the statute shall begin to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud. *Hawley v. Page*, 77 Iowa, 240, 42 N. W. 193. The recording of the deed imparts constructive notice of its contents. If the facts thus shown, taken with other facts known to the creditors, are of a character to suggest fraud as to them, they must be charged with the knowledge which inquiry made with reasonable diligence would disclose. *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. 9; *Hawley v. Page*, supra; *Sims v. Gray* (Iowa) 61 N. W. 171. In this case the Tama county land was situated in the county in which the action against the husband was pending, and was conveyed to the wife three days after the action was commenced, and within three months of its purchase by the husband. They had but little property, the wife having not more than \$300. They continued to reside on the farm, and there was no apparent reason for the change in the title thereto, unless to protect it from the plaintiff. It is not shown that he was in any manner deceived in regard to the property of the wife. Certainly the facts recited were sufficient to cause a man of ordinary prudence, situated as the plaintiff was, to make inquiries which would have shown the fraud, if any, in the conveyance. And this is true with respect to the subsequent acquiring of title to the Sac county land. Both these transactions occurred more than five years before the commencement of this action. It is said, however, that the fraud alleged was continuous, for that the earnings of the husband were placed in the name of the wife from the time the conveyances were made until this action was commenced. But the earnings of the husband were exempt from execution, and it was his right to give them to his wife free from the claims of his creditors. *Jamison v. Weaver*, 87 Iowa, 79, 53 N. W. 1076. We do not hold that fraud in the transaction in question has been shown. There is much support in the record for the claim that Mrs. Stevens agreed to pay for the Tama county land its fair value at that time, and that the property she now owns was derived in part from money which she had when she was married, in part from the increase of the value of the land in both Tama and Sac counties after it was purchased by her, in part

from the labor of her husband, and in part from her own personal exertions. But we need not determine the facts in regard to this. The plaintiff has failed to use the diligence in prosecuting his claim which the law requires, and it is now barred by the lapse of time. The decree of the district court is affirmed.

KIPP v. LAMOREAUX.

(45 N. W. 1002, 81 Mich. 299.)

Supreme Court of Michigan. June 6, 1890.

Error to circuit court, Kent county;
WILLIAM E. GROVE, Judge.

How. St. Mich. § 6190, provides that every sale by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by immediate delivery, and to be followed by an actual and continued change of possession of the things sold, shall be presumed to be fraudulent and void, as against creditors of the vendor, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under the sale, that the same was made in good faith, and without any intent to defraud such creditors.

Taggart, Wolcott & Ganson, for appellant.
Frank G. Holmes, for appellee.

CHAMPLIN, C. J. Sarah B. Kipp brought replevin against Lamoreaux, who is an under-sheriff of Kent county, to recover possession of certain horses and other property which he had levied upon as the property of her husband, Harrison T. Kipp. The plaintiff claimed that she had purchased this property from her husband, who was engaged in the livery stable business. Defendant claimed upon the trial that the sale was fraudulent, and made to delay, defeat, and defraud the creditors of Harrison T. Kipp. The defendant claimed that there had been no change of possession, and that, therefore, the burden of proof was upon the plaintiff to show that the sale was made in good faith, and without any intent to defraud creditors. The errors relied upon in this court relate exclusively to the charge of the court. This charge is couched in the following language:

"Gentlemen of the Jury: This is an action of replevin. It involves the question of who is entitled to the possession of this property at the time of the commencement of suit. The plaintiff claims that she was entitled to the possession as owner of the property, and she claims to have acquired title to the property from Mr. Kipp, now her husband, about the 2d day of October, 1888, I believe, by purchase from him in payment of moneys which she claims she had loaned him. The defendant, who is under-sheriff of this county, claims that at the time of the commencement of this suit he was entitled to the possession of the property by virtue of a levy which he had made upon an execution against the plaintiff's husband. The question of fact for you to determine is who was the owner of this property,—whether Mr. Kipp was the owner at the time the levy was made, or whether the plaintiff Mrs. Kipp was the owner. As you find the fact to be in regard to the claim of the purchase by the plaintiff, so will your verdict be. To entitle the plaintiff to recover in this suit, she must satisfy you by a fair preponderance of the evidence that the sale to her, which she claims was made, was in fact made in good faith, and for full value. If you believe her

testimony, and that of Mr. Kipp, then there was at different times loans made in different amounts, aggregating more than \$700, which were unpaid at the time this bill of sale was made, and \$700 which constituted the consideration for this purchase. Now, it is a general rule that where there is no change in the possession, where the possession of the property remains with the seller, that it is evidence more or less conclusive of fraud. It is *prima facie* evidence of fraud, casting the burden upon the party claiming under the sale to prove by convincing proof that the sale was made in good faith and for value. Our supreme court have held that where the relation of husband and wife exists, and they are the parties to the alleged sale, this rule cannot be applied strictly, although the circumstance is one to be considered; that open or visible change of possession, under such circumstances, cannot be expected where the parties in the alleged sale are husband and wife, and living together. Here the parties were not married, but it is claimed on the part of the plaintiff that a contract of marriage existed between them, and that the day for the wedding was practically fixed to occur within something in the neighborhood of two months following the sale; and that in the mean time she was to go, and did go, to the home of her parents, in another part of the state, to prepare for the approaching marriage, and that on her return they were married, on the 11th day of December.

"Now, under all of those circumstances, if you believe those to be the facts from the evidence—I have concluded not to give you the general rule which I have stated, as applicable to the facts in this case, if you find those to be the facts, but to say to you that you should consider those circumstances, of the relation between the parties, their marriage engagement, and all of the facts developed by the testimony in connection therewith, and also the facility with which frauds may be accomplished between parties bearing such relations to each other, under pretense of sales; and that you should carefully weigh all the testimony bearing upon the question as to whether there was a sale in fact made; and that the proof should be clear and convincing, more so than if the parties were strangers to each other; that alleged sales between parties occupying such relations should be closely scrutinized in weighing the testimony. And if you find the fact to be, from all the evidence, giving it the weight that should be given to it under these instructions, that the sale was as claimed,—that is the controlling question in the case,—if you find that the sale was made in consideration of money loaned, then your verdict should be for the plaintiff; otherwise it should not. Now, in considering the facts and circumstances connected with this alleged sale, it is proper to take into consideration the fact, if you find from the evidence that it is a fact, that Mr. Kipp believed that the debt upon which this execution issued was outlawed, as bearing upon the question of whether he would have an intent to defraud. Also any other fact de-

veloped by the testimony that may aid you in determining the question whether or not the sale was made in good faith. It is claimed that Mr. Kipp had the fraudulent intent, in disposing of this property, to hinder, delay, or defraud his creditors. If you find that to be the fact, it would not be sufficient of itself to entitle the defendant to a verdict in this case, because it would be necessary for you to still further find that the plaintiff in some way participated in that fraud, if you find the other facts that I have told you necessary to be found, that she purchased the property for value. Unless she participated in the fraud, and made the purchase with the intent to help him, if he had himself the intent, it would not be such a fraud as would deprive her of the benefit of the sale which she claims was made to her, if she did in fact purchase the property for full value. Fraud can never be presumed without proof. It is not to be lightly inferred, but must be proved by preponderance of evidence by the party alleging it. Where an honest intent can be as clearly inferred as a dishonest one, the jury should infer that the intent was honest, because the presumption is in favor of innocence. Fraud cannot be presumed from slight circumstances. Proof of fraud should be such as to convince your minds as to its existence; and, if not so proved, your verdict should be for the plaintiff. The form of the verdict, if you find for the plaintiff, will be, 'We find for the plaintiff, and assess the damages at six cents.' If you find for the defendant, then, the defendant having waived a return of the property replevied, your verdict should be for the amount of the value of the property as shown by the evidence. What you find the value of the property to be, would be the amount that the defendant would be entitled to recover, if you find for the defendant."

Counsel for defendant contends that the defendant was entitled to have a charge covering the general rule, where creditors contest a sale of personal property on the ground of fraud as to them, and that the court erred in refusing to give it, and in giving a modified rule as to parties standing in the relation of husband and wife. We think the defendant was entitled to a charge covering his theory of the case, and to the general rule laid down in the statute respecting sales of personal property, where the same is not accompanied by an immediate delivery, and followed by an actual and continued change of possession. At the time the bill of sale was executed the plaintiff and Mr. Kipp were not husband and wife. That was dated October 2, 1888, and they were not married until in December following. A marriage engagement existed, and after the bill of sale was executed she went to Milan to prepare for her wedding. He continued to carry on the livery business in the city of Grand Rapids. The levy was not made until after the marriage. The question of change of possession must in all cases be considered in connection with the other facts in the case. The relation of husband and wife forms no exception to the rule.

The situation of the parties, and their relation to each other, the kind of property, its susceptibility of an actual change, must all be considered, and that must be done which will indicate an actual and continued change of possession; and where this is not the case the burden of proof is upon the purchaser to show that the sale was made in good faith, and without any intent to defraud creditors. From this burden the wife or husband who is a purchaser from the other is not exempt. It is a mistake to suppose that the case of *Davis v. Zimmerman*, 40 Mich. 24, countenances a different doctrine. That case holds that the wife must establish her right to the property (in that case an executed gift) by a fair preponderance of evidence. This right includes the *bona fides* of the transaction, and the non-existence of the intent to defraud creditors, when there has been no actual and continued change of possession. The court, in modifying the general rule upon this branch of the case, told the jury that the controlling question was, if the jury should find that the sale was made in consideration of money loaned, then their verdict should be for the plaintiff; otherwise it should not. This omitted the important element contained in the statute relative to intent. Under this section of the statute it is not enough that the purchase was made in good faith,—that is, for a valuable consideration, with intent to pass the title absolutely; but it is conclusive evidence of fraud, unless the purchaser shall also make it appear that the sale was made without any intent to defraud creditors. Under this statute, a fraudulent intent on the part of the seller, although not participated in by the buyer, will avoid the sale as to creditors. In this respect it differs from sales attacked as fraudulent as to creditors, where there has been an actual and continued change of possession. The assignment of error, based upon the concluding portion of the charge respecting the burden of proof, we think is not well founded. The defendant claimed that the sale was fraudulent, because it was without consideration, and made with intent to defraud Mr. Kipp's creditors. This was in addition to the claim that there had been no change of possession. It was to this claim of fraud that this portion of the charge refers, and it is correct as applied to that branch of the defense. The circuit judge should have submitted the question to the jury whether there had been an immediate delivery, and, if so, whether there had been an actual and continued change of possession, unless it was conceded that there had not been; and that, if the jury find that there had not been an actual and continued change of possession, then they should find whether the sale was made in good faith, and without any intent to defraud the creditors of Harrison T. Kipp. The judgment must be reversed, and a new trial ordered.

LONG, J., did not sit. The other justices concurred.

MACKELLAR v. PILLSBURY et al.
(BOOTH, Intervener).

SAME v. BOOTH.

61 N. W. 222, 48 Minn. 396.)

Supreme Court of Minnesota. Feb. 10, 1892.

Appeals from district court, Hennepin county; Pend. Judge.

Action by Thomas Mackellar against Charles A. Pillsbury and others. S. A. Booth intervened. Judgment for plaintiff. The intervener appeals. Affirmed.

Ripley, Brennan & Booth, for appellant. Emery, Hall & Fletcher, for respondent.

MITCHELL, J. In these cases the appellant, Booth, as assignee of C. E. Cottrell, assails the validity of the sale of certain personal property by his assignor to the plaintiff Mackellar on two grounds, to wit: First, that it was void under the insolvent law of 1881, because made in contemplation of insolvency with a view of giving a preference to one creditor over others; and, second, that it was void, on common-law principles, because made with intent to hinder, delay, and defraud creditors. A mere preference by a debtor of one creditor to another is not fraudulent or void at common law, though the preference may have the incidental effect of hindering the latter from the collection of his debt. Such preferences are not unlawful except as forbidden by the insolvent law of 1881, and they are voidable only in favor of proceedings under and in aid of that act. Outside of such proceedings preferences are not per se objectionable. *Vose v. Stickney*, 19 Minn. 367 (Gil. 312); *Smith v. Dehnbick*, 30 Minn. 60, 14 N. W. 262; *Berry v. O'Connor*, 33 Minn. 29, 21 N. W. 840. It therefore becomes important to ascertain the status of appellant, and the character of the assignment under which he claims, in order to determine whether he is in position to make this attack on the sale in question. It is conceded that the assignment from Cottrell to appellant was not executed under the insolvent law of 1881, but was merely a common-law assignment for the benefit of creditors, as regulated by chapter 44, Laws 1876. But it appears that after the assignment was executed, and the assignee had accepted the trust, the assignor and assignee made an ex parte application to the court, alleging that the intention was to execute an assignment under the insolvent law of 1881, but that a mistake was made through the use of a wrong blank in drafting the instrument, and that upon this ex parte application the court assumed to make a decree amending and reforming the assignment so as to conform to the intentions of the assignor and assignee by inserting therein the necessary provisions to make it an assignment under the insolvent law of 1881. We had supposed that, if anything was settled in the law, it was that an assignment for the benefit of creditors, when

executed by the assignor and accepted by the assignee, creates a valid trust, which cannot be changed or revoked by the assignor, or by the joint act of both assignor and assignee; and what the assignor and assignee cannot do, certainly the court cannot do for them. Indeed, the appellant admits this; but his contention is that it is only the beneficiaries under the assignment the creditors—who can object, and that the plaintiff is not in position to raise the question, or assail collaterally the action of the court. We cannot assent to this proposition. The issue here is one of title to the property, and the question is, what is the nature and extent of the assignee's title, and what, if any, objections is he in position to make to plaintiff's claim of title? The assignee's title, if any, rests exclusively upon the deed of assignment. The action of the court in assuming to change the nature of a vested trust was an absolute nullity, and this the plaintiff had a right to assert as against an attempt of the assignee to set up the void decree for the purpose of assailing his title. The appellant, therefore, was not in position to attack the sale as being an unlawful preference under the insolvent law of 1881, and that question is wholly out of the case.

2. It was open, however, for the assignee to avoid the sale as fraudulent on any grounds upon which creditors of the assignor might avoid it. Gen. St. 1878, c. 41, § 27 (Gen. St. 1894, § 4233). The principal ground upon which it is claimed that the sale was fraudulent and void as against creditors is that it was not accompanied by an immediate delivery, or followed by an actual and continued change of possession. Gen. St. 1878, c. 41, § 15 (Gen. St. 1894, § 4219). Assuming that this was so, yet the effect of it would be merely to raise the presumption that the sale was fraudulent. It would still be competent for the vendee to overcome this presumption by proof of facts showing that the sale was in fact made in good faith, and without any intent to hinder, delay, and defraud the vendor's creditors; and under the statute the questions of good or bad faith and fraudulent intent are questions of fact for the jury or trial court. Gen. St. 1878, c. 41, § 20 (Gen. St. 1894, § 4224); *Vose v. Stickney*, 19 Minn. 367 (Gil. 312); *Mohr v. Barton*, 27 Minn. 530, 8 N. W. 765. The court has expressly found that the sale was made in good faith, and without any intent on the part of said Cottrell or plaintiff to hinder, delay, or defraud creditors. Upon an examination of the entire record we are clearly of opinion that, even assuming that there was not an actual and continued change of possession of the property, the question whether plaintiff had satisfactorily rebutted the presumption of fraud arising from that fact was, upon the evidence, one of fact for the trial court, and that his finding cannot be disturbed. In discussing this branch of the case, counsel for

the assignee lay much stress upon the evidence tending to show that the sale was intended to secure a preference over other creditors to the Twenty-Third Ward Bank of New York, of which plaintiff was president. The evidence to that effect was quite persuasive. But, as already suggested, that point was not in the case, and the evidence referred to had no legitimate tendency to prove the second point, viz., that the sale was made with intent to hinder, delay, or defraud creditors. There is a point in the second, or "Pillsbury," case which is not in the first. Some two or three weeks after the sale already considered, it was found that an error had been made in computing the quantity of property sold. Cottrell had then on hand in his warehouse between 13,000 and 15,000 Brazilian barrels, and, to make good the shortage referred to, he executed to plaintiff a bill of sale of 12,384 of these barrels, but no specific barrels out of the entire lot were ever set apart or designated as those covered by this supplemental bill of sale. Cottrell sold all the barrels indiscriminately to the Pillsburys in the usual course of business in his own name. When Cottrell made the assignment to appellant there was still due from the Pillsburys somewhat more than enough to pay for the 12,384 barrels covered by the bill of sale. Plaintiff brought suit against the Pillsburys to recover the amount which he claimed he was entitled to. Thereupon the appellant intervened, claiming that he, as assignee, was entitled to the money. The point is made that, as no specific barrels were ever set apart out of the whole lot and appropriated to this bill of sale, therefore the title to none of the barrels ever passed from Cottrell to plaintiff. We understand the fact to be that all the barrels were of exactly the same

kind and value. The evidence was sufficient to warrant the conclusion that the intention of the parties was that the title to the barrels should presently pass by the bill of sale, and that thereafter plaintiff should be the owner of 12,384 barrels out of the whole lot, and that they should be under the exclusive control of Kern, plaintiff's agent, who had the right and power at any time to make the separation, and take that number of barrels out of the lot. While there is some confusion and conflict among the authorities on the subject, yet it is settled in this state that where a certain number of articles are sold out of a greater number of exactly the same kind and quality, with the intention that the title should presently pass, and where the vendee has the absolute right at any time to take the amount or number out of the whole mass or quantity, this is sufficient to pass the title, although the specific articles are not actually designated or separated from the remainder. Under such circumstances, until the separation is made the vendor and vendee are tenants in common of the whole according to their respective interests. *Nash v. Brewster*, 39 Minn. 530, 41 N. W. 105; *Benj. Sales*, c. 4, and *American note*. The evidence was sufficient to justify the finding that plaintiff was the owner of these barrels. If, under the particular facts of this case, there was any objection to plaintiff's suing the Pillsburys alone for the amount to which he was entitled, it was obviated by the intervention of the appellant as assignee, for thereafter all the parties interested in the whole sum due from the Pillsburys were before the court, which could award to each the amount to which he was entitled. Order affirmed.

DICKINSON, J., absent, took no part.

HOPKINS v. BISHOP.

(51 N. W. 902, 91 Mich. 328.)

Supreme Court of Michigan. April 8, 1892.

Error to circuit court, Kent county; Allen C. Adsit, Judge.

Replevin by Thomas J. Hopkins against Loomis K. Bishop. Judgment for plaintiff. Defendant brings error. Reversed.

C. O. Smedley, for appellant. D. C. Lyle and Stuart & Knappen, for appellee.

MORSE, C. J. The defendant, as sheriff of Kent county, represents in this litigation attaching creditors of Clinton H. Hopkins, a son of the plaintiff. The plaintiff brought replevin for the goods attached, and recovered judgment in the Kent county circuit court. It was shown by the plaintiff on the trial that his son, who was in the mercantile business at Cedar Springs, was unable to meet his obligations; and that plaintiff was signer of two notes, with his son, to one McBryer, for the means with which to engage in business. These notes were for \$1,000 and \$800, and there was due upon them, December 15, 1890, \$1,898. On that day plaintiff took up these notes and gave his individual note in their stead, and his son gave him a bill of sale of the stock and fixtures in his store, estimated to be worth \$1,500. The book-accounts, amounting to about \$700, and what cash there was on hand, were retained by the son. Plaintiff then went to the store with his son, who delivered the key to him, and informed the clerk that plaintiff was thereafter to be proprietor. Plaintiff then hired the clerk and his son to run the business for him. Two days thereafter the attachment levies were made. December 23, 1890, plaintiff replevied without making any demand for the goods. It is contended that a demand should have been made, as the goods were found in the possession of the son, Clinton H. Hopkins, against whom the writs of attachment ran. Authorities are cited to the effect that, where property seized on attachment or execution is found by the officer in the actual custody of the person named in the writ, the possession under the levy is lawful, and a demand is necessary before replevin can be brought. In this state, a demand before suit is not requisite if, at the time of the levy, the goods seized are the property of the person suing in replevin. The fact that such goods are in the lawful possession of the person named in the writ of attachment or execution does not affect the right of the owner as against one taking possession of them in hostility to him. The question of demand before suit by the owner to regain possession of his property depends upon whether the taking was lawful as against him. If the plaintiff in this case had a right to recover this property from the sheriff, no demand was necessary. The sheriff may have, in good faith, levied upon these goods, believing them to be the prop-

erty of Clinton H. Hopkins; but, as the right of plaintiff to regain possession of them does not at all depend upon the good faith of the officer in taking them, there is no good reason, as shown in *Trudo v. Anderson*, 10 Mich. 357, for a demand before suit. The taking, if the plaintiff was owner, was a trespass, and would itself have constituted a conversion in trover without proof of a demand and refusal.

There are several assignments of error to the refusal of the circuit judge to give defendant's requests to charge. These requests are not set out in the bill of exceptions, nor in the printed record, except as they appear in the assignments of error. These assignments form no part of the bill of exceptions, and we cannot presume against the validity of a judgment that a request to charge, not found in the bill of exceptions, was presented to the circuit judge, from the mere fact that such request is set out in the assignments of error. The assignments, therefore, as to the requests not given by the court, will not be considered. *Lindner v. Hine*, 84 Mich. 512, 48 N. W. 43.

It is assigned as error that the circuit judge modified the tenth request of defendant, which was as follows: "The sale must be accompanied by an actual and continued change of possession as well as a nominal and constructive change, or the transaction will be deemed fraudulent as against creditors; and a construction which would allow the vendor or assignor of a stock of goods to continue in possession thereof, and to sell them out as the agent of the purchaser or assignee, would render the statutory provision for the prevention and detection of frauds a mere nullity,"—by adding to the same: "That is, if you should find that Clinton H. Hopkins was left there in charge of the goods as a mere figure-head, and there was not an honest and open transfer." It is claimed that this request, as presented, was good law, and applicable to the case under the ruling of this court in *Doyle v. Stevens*, 4 Mich. 93; citing with approval the language of the court in *Butler v. Stoddard*, 7 Paige, 166. But it was held in *Doyle v. Stevens* that, if there was any evidence tending to show an open, outward change of possession and a continuation of it, it would be a question of fact for a jury. In this case the transaction between the plaintiff and his son was not concealed from any one. The day the alleged sale took place the fact was made known to McBryer, who was a creditor to the extent of over \$1,800, and the clerk in the store was made acquainted with the change. All the possession that could have been taken was taken, except the putting out of the son as an employé, and the going in of the plaintiff to manage the store personally. The plaintiff was not a merchant, and, unless he was precluded, as a matter of law, from hiring the son to manage the business for him, the question whether or not there was

such a change of possession as satisfied the statute was one for the jury to determine. We do not think the defendant was entitled to the request as worded, as it left out an important element, to-wit, that, even where there is not such a change of possession as will remove the presumption that the sale is fraudulent, it is still open to the purchaser to show that the sale was made in good faith, and without any intent to defraud creditors.

But it is further contended that this modification of the request placed the burden of proof upon the defendant to show that the transfer was fraudulent as against creditors, when the fact appearing, as it did, that the son was left in the full management of the business, negatived the idea of an actual and continued change of possession, and therefore put the burden, under the statute, (How. Ann. St. § 6190,) upon the plaintiff. And in this connection complaint is made of the charge of the court, as follows: "And, indeed, in order to constitute a valid delivery and change of possession, it is not necessary that the buyer himself should actually have ever been present at the store or where the property is, but, if you believe that an actual sale was made to the plaintiff, he could authorize his son or any other person to take possession for him and hold possession." And it is also averred that the court, in saying, as he did, once or more, in the charge, that the burden of proof is upon the defendant to show fraud in this case, also tended to lead the jury to believe that it was for the defendant, under the circumstances of the case, to prove that the transfer was a fraudulent one. A careful examination of the charge of the court shows that the burden of proof was put upon the defendant to show that this sale was fraudulent as against creditors, without any reference to what the

jury might find as a fact as to an actual and continued change of possession of the goods. This was error. There is no doubt but what there was in law a sufficient immediate delivery; and if, upon the delivery of the key to plaintiff, he had gone into the store, and assumed the management of it, the mere fact of his hiring his son to help him in the business or the management of it would not have militated against his "actual and continued possession" under the statute; but there was testimony tending to show that the key was returned to the son a few days afterwards, and that, as far as any outward evidence was concerned, the son was running the business after the sale the same as before. The jury should have been instructed that, if they found that the possession of these goods was not actually and continually in the plaintiff from the delivery up to the time of the levy, then it was for him to show that the sale was an honest one. It would not be necessary that the plaintiff himself should remain at the store and personally manage the business. He had the right to select an agent to do this for him. But he could not select a vendor of the goods as such agent, unless something was done to give the public to understand that the possession of the vendor was the possession of the plaintiff; that there had been a change in the ownership of the goods. This change must be an "open, visible, substantial" one. *Clark v. Lee*, 78 Mich. 231, 44 N. W. 260.

The court had no right to send an answer to the jury-room to a question propounded in writing to him by the jurors, after they had retired to deliberate upon their verdict, without the consent of counsel in the case. The judgment is reversed, and a new trial granted, with costs of this court to defendant. The other justices concurred.

WHITE et al. v. COTZHAUSEN.

(9 Sup. Ct. 309, 129 U. S. 323.)

Supreme Court of the United States. Jan. 28, 1889.

Appeal from the circuit court of the United States for the Northern district of Illinois.

This is an appeal from a decree declaring two conveyances of real property in Illinois, a bill of sale of numerous pictures, a judgment by confession in one of the courts of that state pursuant to a warrant of attorney given for that purpose, and certain transfers of property accompanying that warrant, to be void as against the appellee, Cotzhausen, a judgment creditor of Alexander White, Jr. It is assigned for error that the decree is not supported by the evidence. Besides controverting this position, the appellee contends that the conveyances, judgment by confession, and transfers were illegal and void under the provisions of the act of the general assembly of Illinois in force July 1, 1877, concerning voluntary assignments for the benefit of creditors. 1 Starr & C. St. 1303. The record contains a large amount of testimony, oral and written, but the principal facts are as follows: Alexander White, Sr., died intestate in the year 1872; his wife, Ann White, four daughters, Margaret, Elsie, Mary S., and Annie, and two sons, Alexander and James B., surviving him. Each of the children, except James, was of full age when the father died. At the request of the mother, and with the assent of his sisters, Alexander White, Jr., qualified as administrator, and in that capacity received personal assets of considerable value. With their approval, if not by their express direction, he undertook the management of the real estate of which his father died possessed: making improvements, collecting rents, paying taxes, and causing repairs to be made. He received realty in exchange for stock in a manufacturing company, and in part exchange for the homestead, taking the title in his own name. After the death of the father, the widow and children remained together as one household, the expenses of the family, and of each member of it, being met with money furnished by Alexander White, Jr., out of funds he received from time to time, and deposited in bank to his credit as administrator. But no regular account was kept showing the amount paid to or for individual members of the family. In 1878 it was determined by the widow and children to have an assignment of dower and a partition of the real property, and proceedings to that end were instituted in the circuit court of Cook county, Ill. Before the close of that year, or in the spring or summer of 1879, having failed to obtain from the administrator a satisfactory account of the condition of the estate, they consulted an attorney, who, upon investigation, ascertained (using here the words of the appellants' counsel) that Alexander White, Jr., "had lost the entire personal estate, and had nothing except his interest as an heir in certain

of the real estate with which to make good his losses." It appeared, as is further stated, that he had mortgaged some of the real property the title to which had been taken in his name; had anticipated rents on other property; had exchanged lands for stock in a heating and ventilating company; had allowed taxes to accumulate; and had, besides, induced some members of the family to guaranty his notes to a large amount. Upon these disclosures being made, the property was put under the immediate charge of the younger son, and the attorney with whom the mother and sisters had advised was directed to collect the amount due from Alexander White, Jr. Thereupon a friendly accounting was had, which resulted in a report by him to the probate court, on the 18th of July, 1879, of his acts and doings as administrator during the whole period from the date of his appointment, April 9, 1872, to July 21, 1879. The report admits a balance due from him as a administrator of \$89,646.05, and charges him, "by virtue of the statute," (Rev. St. Ill. 1874, c. 3, § 113.) with \$40,123.80, being interest on that sum from January 21, 1875, to July 21, 1879, at the rate of 10 per cent. per annum; in all, the sum of \$129,769.85. He does not seem to have asserted any claim whatever for his services as administrator, or for managing the real property. That report was approved by the probate court, which made an order, July 22, 1879, directing the said sum of \$129,769.85 to be distributed and paid by the administrator as follows: To the widow, \$43,256.61, and to each of the other children, \$14,418.57. It should be stated in this connection, that on the 16th of July, 1879, two days before the report to the probate court, the proceedings in the partition suit were brought to a conclusion by a decree assigning dower to the widow, and setting off specific parcels of land to Margaret and Alexander, respectively, and other parcels to the remaining heirs jointly. On the same day, Alexander White, Jr., executed two conveyances,—one to his sisters (except Margaret) and his brother James, jointly, for part of the lands assigned to him by the decree of partition, and the other to his sister Margaret for the remaining part; the former deed reciting a consideration of \$56,859.20, which is about the aggregate of the several amounts subsequently directed to be paid by the administrator to his brother and sisters, (except Margaret,) while the latter deed recited a consideration of \$14,214.80, which is about the sum directed to be paid to his sister Margaret. Two days later, July 18, 1879, Alexander White, Jr., executed to his mother, brother, and sisters (except Margaret) a bill of sale of his interest in certain pictures which had come to his hands as administrator; and three days thereafter, July 21, 1879, he executed to his mother a note, accompanied by a warrant of attorney to confess judgment, and by a conveyance and transfer of certain real and personal property as collateral security for the note. Subsequently, September 4, 1879, pursuant to that

warrant of attorney, judgment was entered against Alexander White, Jr., for \$43,807.50, in the circuit court of Cook county. It is not claimed that any money was paid to him in these transactions, and it is admitted that the sole consideration for his transfers of property to the members of his family was his alleged indebtedness to them, respectively.

By the final decree in these consolidated causes, it was adjudged that the two conveyances of July 16, 1879, the bill of sale of July 18, 1879, and the judgment by confession of September 4, 1879, and the transfers accompanying the warrant of attorney of July 21, 1879, were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee, Cotzhausen, who was found by the decree to be a creditor of Alexander White, Jr., in the sum of \$27,842.22, the aggregate principal and interest of four several judgments obtained by him against White, in 1881 and 1882. The debts for which these judgments were rendered originated in the early part of 1878, in a purchase from Cotzhausen of nearly all the stock of the American Oleograph Company, whose principal place of business was Milwaukee, Wis. In this purchase Alexander White, Jr., was interested. It is to be inferred from the evidence that the principal object he had in making it was to transfer the office of the company to one of the buildings owned by the family in Chicago, and to start or establish his younger brother in business. His mother and sisters were evidently aware of his purchase, and approved the object for which it was made. It may be here stated that Margaret White died unmarried and intestate before the decree in this cause was entered, but the fact of her death was not previously entered of record. The parties to the present appeal, however, have, by written stipulation filed in this cause, waived all objections they might otherwise make by reason of that fact. It is further stipulated that the appellants are the only heirs at law of Margaret White. The appellee waives all objections to the present appeal on the ground that Alexander White, Jr., did not join in it.

Tra W. Buell and *C. M. Osborn*, for appellants. *Enoch Totten* and *F. W. Cotzhausen*, for appellee.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

Too much stress is laid by the appellee upon the fact that Alexander White, Jr., after qualifying as administrator, was authorized by his mother and sisters to control, in his discretion, both the real and personal estate of which his father died possessed. The granting of such authority cannot be held to have created any lien in favor of his creditors upon their respective interests. Nor can it be said that they surrendered their right to demand from him an accounting in respect to his management of the property. Upon such accounting he might become indebted to them; and, to the extent that he was justly so indebted,

they would be his creditors, with the same right that other unsecured creditors had to obtain satisfaction of their claims. The mode adopted by them to that end, with full knowledge as well of his financial condition as of the fact that he was being pressed by Cotzhausen, was to take property on account of their respective claims. After he had executed the conveyances, bill of sale, warrant of attorney, and transfers, to which reference has been made, he was left without anything that could be reached by Cotzhausen. So completely was he stripped by these transactions of all property that subsequently, when his deposition was taken, he admitted that he owned nothing except the clothing he wore. He recognized his hopelessly insolvent condition, and formed the purpose of yielding to creditors the dominion of his entire estate; and it is too plain to admit of dispute that in executing to his mother, sisters, and brother the conveyances, bill of sale, warrant of attorney, and transfers in question his intention was to give them, and their intention was to obtain, a preference over all other creditors. What was done was in execution of a scheme for the appropriation of his entire estate by his family, to the exclusion of other creditors, thereby avoiding the effect of a formal assignment. The first question, therefore, to be considered is whether the several writings executed by Alexander White, Jr., for the purpose of effecting that result, may be regarded as, in legal effect, one instrument, designed to evade or defeat the provisions of the statute of Illinois known as the "Voluntary Assignment Act," in force July 1, 1877.

The first section of that statute provides "that, in all cases of voluntary assignments hereafter made for the benefit of creditor or creditors, the debtor or debtors shall annex to such assignment an inventory, under oath or affirmation, of his, her, or their estate, real and personal according to the best of his, her, or their knowledge; and also a list of his, her, or their creditors, their residence and place of business, if known, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other property, not exempt by law, belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms of the same. Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made has been carried on; and in case said assignment shall embrace lands, or any interest therein, then the same shall also be recorded in the county or counties in which said land may be situated." Other sections provide for publication of notices to creditors; for the execution by the assignee of a bond and the filing of an inventory in the county court; for the report of a list of all creditors of the assignor;

and for exception by any person interested to the claim or demand of any other creditor. The sixth section provides "that at the first term of the said county court, after the expiration of the three months, as aforesaid, should no exception be made to the claim of any creditor, or if exceptions have been made, and the same have been adjudicated and settled by the court, the said court shall order the assignee or assignees to make, from time to time, fair and equal dividends (among the creditors) of the assets in his or their hands, in proportion to their claims," etc. The eighth section declares that "no assignment shall be declared fraudulent or void for want of any list or inventory as provided in the first section." The thirteenth section is in these words: "Every provision in any assignment hereafter made in this state providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof."

The main object of this legislation is manifest. It is to secure equality of right among the creditors of a debtor who makes a voluntary assignment of his property. It annuls every provision in any assignment giving a preference of one creditor over another. No creditor is to be excluded from participation in the proceeds of the assigned property because of the failure of the debtor to make and file the required inventory of his estate and the list of his creditors; nor, if such a list is filed, is any creditor to be denied his *pro rata* part of such proceeds because his name is omitted, either by design or mistake upon the part of the debtor. The difficulty with the courts has not been in recognizing the beneficent objects of this legislation, but in determining whether, in view of the special circumstances attending their execution, particular instruments are to be treated as part of an assignment, within the meaning of the statute. The leading case upon this subject in the supreme court of Illinois is *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. Rep. 903. In that case the members of an insolvent firm, in anticipation of bankruptcy, made, within a period of less than thirty days, four conveyances of their individual estate to near relatives, and various payments of money to other relatives, on alleged debts; after these conveyances and payments, and with full knowledge of impending failure, the members of the firm held a conference with their legal advisers before the expiration of said thirty days, respecting the measures to be adopted by them, and the shape their failure was to assume. It was determined that they should make a voluntary assignment, but that preference be given to certain creditors by executing to them what are called "judgment notes." The assignment in form was made, but on the same day, and before it was executed, the creditors to whom the notes were given caused judgment by confession to be entered thereon, and immediately, and before the deed of assignment was or could be filed, caused

execution to be issued and levied, whereby they took to themselves the great bulk of the debtor's estate. The trustee named in the assignment having refused to attack the preferences thus secured, a creditor brought suit in equity, upon the theory that the giving of the judgment notes and the making of the deed of assignment were parts of one transaction, and consequently the preferences attempted were illegal and void under the statute. The supreme court of Illinois, considering the question whether the preferential judgments obtained in that case were within the prohibitions of the act of 1877, said: "The statute is silent as to the form of the instrument or instruments by which an insolvent debtor may effect an assignment * * * If, then, these preferences are to be held to be within the 'provisions' of the assignment or 'comprehended within its general terms,' it must be because they fall within the intent and spirit of the act. It will be observed this act does not assume to interfere, in the slightest degree, with the action of a debtor, while he retains the dominion of his property. Notwithstanding this act, he may now, as heretofore, in good faith sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it by operation of law, as by confessing a judgment in favor of a *bona fide* creditor. But when he reaches the point where he is ready, and determines, to yield the dominion of his property, and makes an assignment for the benefit of his creditors, under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate, not exempt by law, to his assignee,—rendering void all preferences, and bringing about the distribution of his whole estate equally among his *bona fide* creditors; and we hold that it is within the spirit and intent of the statute that when the debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken,—the law will regard all his acts having for their object and effect the disposition of his estate as parts of a single transaction, and, on the execution of the formal assignment, it will, under the statute, draw to it, and the law will regard as embraced within its provisions, all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors; and, if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given the assignment, and such preferences will, in a court of equity, be declared void, and set aside as in fraud of the statute." After setting out the details of the plan devised to secure certain creditors a preference in advance of the filing of the deed of assignment, the court further said: "It will be observed that all this was strictly in accordance with the forms of law; but will anyone deny that a most palpable fraud was

in fact perpetrated upon the appellee, Spaulding, by the debtors, or that the acts of the debtors were in fraud of the statute? * * * This voluntary assignment act is in its character remedial, and must therefore be liberally construed, and no insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and, whatever obstacles might be encountered in other courts of this state, a court of equity, when properly invoked, was bound to look through and beyond the form, and have regard to the substance, and, having done so, to find and declare these preferential judgments void under the statute, and to set them aside." See, also, *Bank's Appeal*, 57 Pa. St. 193, 199; *Winner v. Hoyt*, 66 Wis. 227, 239, 28 N. W. Rep. 380; *Wilks v. Walker*, 22 S. C. 108, 111.

We agree with the supreme court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed "largely and beneficially, so as to suppress the mischief and advance the remedy." That court said in *Railroad Co. v. Dunn*, 52 Ill. 260, 263: "The rule in constraining remedial statutes, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it." See, also, *Johnes v. Johnes*, 3 Dow, 15. If, then, we avoid over-strict construction, and regard substance rather than form; if effect be given to this legislation, as against mere devices that will defeat the object of its enactment,—the several writings executed by Alexander White, Jr., all about the same time, to his mother, sisters, and brother, whereby, in contemplation of his bankruptcy, and according to a plan previously formed, he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction, and operating as an assignment or transfer under which the appellee, Cotzhausen, may claim equality of right with the creditors so preferred. It is true there was not here, as in *Preston v. Spaulding*, a formal deed of assignment by the debtor under the statute. But of what avail will the statute be in securing equality among the creditors of a debtor who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and permitting them, under the cover or by means of conveyances, bills of sale, or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? If Alexander White, Jr., intending to surrender all his property for the benefit of his creditors, and to stop business, had excepted from the conveyances, bill of sale, and transfers executed to his

mother, sisters, and brother a relatively small amount of property, and had shortly thereafter made a general assignment under the statute, it could not be doubted, under the decision in *Preston v. Spaulding*, and in view of the facts here disclosed, that such conveyances, bill of sale, and transfers would have been held void as giving forbidden preferences to particular creditors; and his assignment would have been held, at the suit of other creditors, to embrace, not simply the property owned by him when it was made, but all that he previously conveyed, sold, and transferred to his mother, sisters, and brother. But can he, having the intention to quit business and surrender his entire estate to creditors, be permitted to defeat any such result by simply omitting to make a formal assignment, and by including the whole of his property in conveyances, bills of sale, and transfers to the particular creditors whom he desires to prefer? Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated.

We would not be understood as contravening the general principle, so distinctly announced by the supreme court of Illinois, that a debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditor. *Preston v. Spaulding*; *Field v. Geobegan*, 125 Ill. 70, 16 N. E. Rep. 912. Such transactions often take place in the ordinary course of business, when the debtor has no purpose, in the near future, of discontinuing business, or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses, in order to avoid a general assignment for the benefit of his creditors. We only mean by what has been said that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made, and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, we think, is the necessary result of the decisions in the highest court of the state.

The views we have expressed find some

support in adjudged cases in the Eighth circuit, where the courts have construed the statute of Missouri providing that "every assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims." Referring to that statute, KREKEL, J., said, in *Kellog v. Richardson*, 19 Fed. Rep. 70, 72, following the previous case of *Martin v. Hausman*, 14 Fed. Rep. 169: "A merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law: it places all creditors upon an equal footing." So in *Kerbs v. Ewing*, 22 Fed. Rep. 633, where Judge McCARY, referring to the Missouri statute, said: "No matter what the form of the instrument, where a debtor, being insolvent, conveys all his property to a third party, to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors: the preference being in contravention of the assignment laws of this state." Again, in *Freund v. Yaegerman*, 26 Fed. Rep. 812, 814, it was said by TREAT, J., that the conclusion reached by Mr. Justice MILLER, and Judges McCARY, KREKEL, and himself, was "that, under the statute of the state of Missouri concerning voluntary assignments, when property was disposed of in entirety or substantially—that is, the entire property of the debtor, he being insolvent—it fell within the provisions of the assignment law. The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute." See, also, *Perry v. Corby*, 21 Fed. Rep. 737; *Clapp v. Dittman*, *Id.* 15; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71.

If Alexander White, Jr., had made a formal assignment of his entire property in trust for the benefit, primarily or exclusively, of his mother, sisters, and brother, as creditors, its illegality would have been so apparent that other creditors would have been allowed to participate in the proceeds of sale. By the conveyances, bill of sale, confession of judgment, and transfers, all made about the same time, and pursuant to an under-

standing previously reached, he has effected precisely the same result as would have been reached by a formal assignment to a trustee for the exclusive benefit of his mother, brother, and sisters. The latter is forbidden by the letter of the statute, and the former is equally forbidden by its spirit. Surely, the mere name of the particular instruments by which the illegal result is reached ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere forms.

It remains only to consider the effect of these views upon the decree below. We have already seen that the circuit court proceeded upon the ground that the conveyances, bill of sale, confession of judgment, and transfers by Alexander White, Jr., were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee. Upon these grounds it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties, for the mother, sisters, and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended, by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors.

It results that the decree below is erroneous, so far as it directs the property, rights, and interests therein described to be sold in satisfaction primarily of the sums found by the decree to be due from Alexander White, Jr., to the appellee. The case should go to a master to ascertain the amount of all the debts owing by Alexander White, Jr., at the date of said conveyances, bill of sale, and transfers. In respect to the amounts due from him to his mother, sisters, and brother, respectively, it is not necessary, at this time, to express any opinion, further than that the accounting in the probate court between them is not conclusive against the appellee. It will be for the court below to determine, under all evidence, what amounts are justly due from Alexander White, Jr., to his mother, sisters, and brother, taking into consideration all the circumstances attending his management of the property, formerly owned by his father, whether real or personal. To the extent we have indicated the decree is reversed, each side paying one-half the costs in this court; and the cause is remanded, with a direction for further proceedings not inconsistent with this opinion.

The Chief Justice did not sit in this case, or participate in its decision.

WARNER v. LITTLEFIELD, Sheriff.

(50 N. W. 721, 89 Mich. 329.)

Supreme Court of Michigan. Dec. 22, 1891.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action in trover by Charles E. Warner, trustee under a chattel mortgage for the benefit of creditors of Minnie Wertheimer, against Louis B. Littlefield, for the conversion of goods covered by the mortgage, by attaching the same at the instance of a creditor of said Minnie Wertheimer. Plaintiff had judgment, and defendant brings error. Reversed, and new trial granted.

Julian G. Dickinson, for appellant. Griffin, Warner & Hunt, for appellee.

CHAMPLIN, C. J. This action is trover. The defendant was sheriff of Wayne county, and pleaded the general issue, and gave notice that he seized the goods declared for, as sheriff of Wayne county, by virtue of a certain writ of attachment issued out of the circuit court of Wayne county against Minnie Wertheimer, and that he would show that the claim to the goods set up by plaintiff was fraudulent and void against the creditors of said Minnie Wertheimer; that the mortgage, so called, under which the plaintiff claims, was made with intent to cheat and defraud her creditors; that it comprised substantially all of her property subject to execution; that it was given for the purpose of distributing her property to certain of her creditors in preference to others, and was made for the purpose of covering and concealing her property; that the plaintiff in said cause was not a bona fide purchaser, and is chargeable with notice of the facts and circumstances constituting the fraud perpetrated by the said Minnie Wertheimer in said transaction; that the said mortgage of said property to plaintiff did not comprise a large portion of the property of said Minnie Wertheimer, which she had concealed and covered by transfers to parties in St. Paul and Chicago, and to the Western Knitting Company, of Detroit, and to Max Pulaski, of Detroit, with the view to defeat and defraud her creditors; that a large portion of the indebtedness mentioned in said mortgage, and which is pretended to be secured thereby, is fictitious and fraudulent as against the creditors of the said Minnie Wertheimer, notably indebtedness therein mentioned to Max Wertheimer, Morris Wertheimer, and Joseph Wertheimer.

On the 13th of December, 1889, Minnie Wertheimer, who was then engaged in business in the city of Detroit under the name of Wertheimer Bros., executed a chattel mortgage, in which she set forth that she was justly indebted to several creditors, naming them, and the amounts owing to each, and to secure the payment of such claims, and of indemnifying Bernard Wurzberger and Freund Bros. against liability upon certain obligations, mortgaged certain property, fully described in such chattel

mortgage, to "Carlos E. Warner, of Detroit, Mich., in trust for said parties severally," upon certain conditions, as follows: "The conditions to these presents are such that if I, the said Minnie Wertheimer, doing business as aforesaid, shall pay, or cause to be paid, to said Warner, trustee, the claims and demands aforesaid, and each and all thereof, within ten days from the date hereof, with interest thereon from the maturity of said several claims and demands, and shall keep and save harmless the said Wurzberger and the said Freund Bros. from liability as aforesaid, then this obligation shall be void, otherwise to remain in full force; and I, the said Minnie Wertheimer, agree to pay the same accordingly, and keep said Wurzberger and said Freund Bros. free and harmless from liability as aforesaid. But if default shall be made in the payment of said debts and demands or any thereof and the interest thereon, or any portion thereof, within the time or manner herein provided; or if I, said Minnie Wertheimer, shall not keep and save harmless the said Wurzberger and said Freund Bros., or either of them, from liability as aforesaid; or if I shall sell, assign, or dispose of said goods and chattels, (excepting those expressly excepted herein,) or shall remove, or attempt to remove, the whole or any portion thereof from the premises aforesaid, without the written consent of said Warner, trustee, except in the usual course of trade; or if the said Warner, trustee, shall deem himself or said debts, or any of them, insecure,—then, in each such instance, the said Warner, trustee, his successors or assigns, or his or their authorized agents, are hereby expressly authorized to enter the said several premises, or any place or places where said goods and chattels, or any portion thereof, may be, and take possession thereof, subject to said exemption, and sell the same, or so much thereof as shall be necessary to pay the expenses incurred in and about the taking possession of said goods and chattels, and in the care thereof, and in and about the foreclosure of this mortgage, and the costs and charges, taxes and insurance, and services hereinbefore mentioned, and the claims and demands hereinbefore mentioned, and each and all thereof, and the interest thereon, and to keep and save harmless the said Wurzberger and Freund Bros. from liability as aforesaid, at public auction, to the highest bidder, or at private sale, in bulk or parcels, at his option, (anything contained in this mortgage to the contrary notwithstanding,) after giving five days' notice of such sale, and the time and place of such sale, by posting written or printed notice thereof in three public places in the city of Detroit and Cheboygan aforesaid. The said Warner, trustee, is hereby authorized to insure said goods and chattels in such sum as he may deem proper to protect his interests in this mortgage, and the moneys paid therefor may be added to and become a part of the debts herein secured, and shall be payable forthwith, and draw interest at the rate of seven per cent. per annum. The said Warner, trustee, is also au-

thorized to pay all taxes that are assessed against said goods and chattels, and add the same to the debts herein secured, and to be payable forthwith, with like interest. From the moneys realized upon this mortgage in any manner by said Warner, trustee, he shall pay and apply the same in the following manner, to-wit: First. He shall pay all of the expenses incurred by him in and about the execution of the trust herein created. Second. He shall pay said taxes, insurance, and the expenses incurred in and about the foreclosure of this mortgage. Third. He shall pay himself a reasonable compensation for his services in executing the trusts herein created. Fourth. With the residue and remainder he shall first pay in full the following of the claims and demands hereinafore mentioned, if sufficient there shall be; if not, to prorate the same among them, viz., the said claims of the German American Bank, Wurzberger, Freund Bros., C. E. Bresler, Schloss Bros. & Co., S. S. Simon & Co., Jacob Brown & Co., L. Krug, Goldsmith Bros., Mrs. A. Linx, Henry Tittlebaum, Max Wertheimer, Albert Finsterwald, the Kalamazoo Overall Company, M. Rosenberg & Co., Isaac Wertheimer, and Joseph Wertheimer, guardian, and Meier & Schuknecht, and Morris Wertheimer. Fifth. And, after the payment in full of said claims, he shall pay, apply, and prorate the residue among the remainder of the parties hereinbefore first mentioned in proportion to the amount of their respective claims; the surplus, if any, to be returned to said first party." This trust was accepted in writing by Warner on the same day.

Upon the trial in the circuit, the court, under the testimony introduced, directed a verdict for plaintiff, and left it for the jury to determine the value of the goods seized by the defendant, and the defendant brings error.

Considerable testimony was introduced upon the trial which the defendant's attorney claims had a tendency to prove that the mortgage was fraudulent in fact as a conveyance made with intent to delay and defraud creditors. He also claims that it was fraud in law, as being an assignment at common law, and was void under the statute (1 How. Ann. St. § 8720), which enacts: "All assignments, commonly called 'common-law assignments,' for the benefit of creditors, shall be void, unless the same shall be without preferences as between such creditors, and shall be of all the property of the assignor not exempt from execution."

The first question is whether the instrument is void, as contravening the statute above referred to. The first objection to the instrument, upon which some reliance seems to be placed, is that the instrument is made to Warner, who was not a creditor, in trust for the creditors named; but this does not tend in the remotest degree to give the instrument the character of a common-law assignment. The instrument must be read as a whole, and the intent gathered from its entire contents. By naming him as trustee, the conveyance did not vest in him the absolute title to the property, and place it

beyond the reach of creditors. If valid, the mortgagor and subsequent lienholders had a right of redemption; not so, if it was a common-law assignment. This question ought to be considered as settled by the repeated decisions of this court. It first arose in *Pagg v. Jerome*, 7 Mich. 145. There, as here, a mortgage was executed to Robert P. Toms and George Jerome, to act as trustees for the creditors named in the mortgage. It was claimed on the part of the unsecured creditors that this conveyance was in its nature and true effect an assignment in trust by an insolvent debtor of all his property for the benefit of his creditors, and should be governed by rules applicable thereto: (1) That it was a conveyance by an insolvent debtor, conscious of his utter insolvency; (2) that it was of all his property; (3) it was in trust for the benefit of creditors other than the trustees, and to secure the payment of the debts of such other creditors; (4) it involved a resulting trust to the grantor. Mr. Justice Manning, in delivering the opinion of the court, said: "The mortgage is an ordinary chattel mortgage with two exceptions. It is given to the defendants in error instead of the creditors of Bayless who are mentioned, with the amount Bayless was owing each one of them, in the recital; and it contains a provision that the defendants in error shall not be liable for anything except their own personal fault and neglect. These were matters proper for the jury to take into consideration, with the other evidence in the case, but we see nothing in them rendering the mortgage fraudulent." In *Adams v. Niemann*, 46 Mich. 137, 8 N. W. 719, the mortgage was made to Niemann and Emil Jochen jointly, but the debts intended to be secured were not joint, but several. Niemann had two claims, one for a personal debt due to himself, originally, and one covering liabilities which he had undertaken for Ernest Jochen to other creditors. Emil Jochen also had a personal claim, and it was insisted that a joint mortgage could not be made to cover separate debts. Mr. Justice Campbell, in delivering the opinion of the court, said: "We do not think there is any legal objection to such a mortgage. We have already held, at this term, that a policy of insurance may be taken jointly to secure property owned in severalty. *Castner v. Insurance Co.*, 46 Mich. 15, 8 N. W. 554. It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. A mortgage to a third person would be as valid as a mortgage to a creditor. The choice of a mortgagee is a matter of convenience, and there can be no wrong, and there may be some advantage, in giving to all of the secured creditors a control over the security in which all are ratably interested, and it would effectually prevent any disputes as to priority." The question came before the court again in *Walker v. White*, 60 Mich. 427, 27 N. W. 554. In that

case a mortgage was executed by a member of a firm in the firm name, to Walker, as trustee for certain creditors therein named, including also the claim of Henry E. Porter, at \$900. It was claimed in this case that the mortgage really amounted to an assignment with preference. Mr. Justice Morse, in delivering the opinion of the court, said: "The mortgage was so drawn as to specify the amount of indebtedness to each creditor specifically, and the plaintiff was by its terms made trustee for the collection and payment of the amount owing to each. There is no legal objection to such a mortgage. (*Adams v. Niemann*, 46 Mich. 137, 8 N. W. 719.) and we think each mortgagee could enforce his own claim under the mortgage, his separate debt being clearly stated. (*Herm. Chatt. Mortg.* 357; *Burnett v. Pratt*, 22 Pick. 556; *Gilson v. Gilson*, 2 Allen, 115.)" The validity of a mortgage securing several separate creditors in one instrument was again affirmed in *Lyon v. Ballentine*, 63 Mich. 99, 29 N. W. 837. If in this case there had been successive mortgages running to the creditors, and thereby securing a preference in favor of these same creditors no one would contend that all together they would constitute a general assignment. The effect of the instrument in this case is no different. It was said in *Walker v. White* that each creditor could enforce the mortgage for his own benefit, to the same extent as if he had a separate mortgage.

Two features are relied upon as taking this instrument out of the category of chattel mortgages, and relegating it to that of common-law assignments. One is that which I have just noticed, the mortgage being made to a trustee; and the other that it includes all the property of the debtor. Expressions have crept into some decisions to the effect that if the property is conveyed in trust the instrument is thereby changed from a chattel mortgage to an assignment. But such is not the law, unless the conveyance is absolute, and places the title of the property in the trustee. Every chattel mortgage contains a trust to a certain extent. It necessarily creates a trust in the mortgagee as to the surplus, but this does not invalidate the mortgage. *Jones, Mortg.* § 353. Even an assignment by a debtor to his creditor of personal property, upon trust to sell and pay his debt, with reservation to himself of the surplus, if any there be, is held to be in effect a mortgage. *Jones, Mortg.* § 352, and cases cited in note 2. If the mortgage is to a trustee for the benefit of creditors, as was held in *Adams v. Niemann*, 46 Mich. 137, 8 N. W. 719, it is as valid as if made to the mortgagee. The question in such cases is this: Is the title of the property conveyed to the trustee so that it is beyond the reach of the creditors of the mortgagor? If their relation to the property is not changed by the interposition of a trustee between the creditors and the property of their debtor, so that they cannot reach the surplus, or redeem from the

mortgage, and become subrogated to the rights of the mortgagee, then the instrument is valid as a chattel mortgage. If the position of the unsecured creditors is not changed; if their legal rights are the same as they would be if separate mortgages were executed directly to the creditors secured,—it would be nonsense to hold that the intervention of the name of a trustee, merely for convenience, and representing the rights of such creditors as mortgagees, would destroy the validity of a mortgage, and change it to a common-law assignment. There is no baleful magic in the words, "in trust for the benefit of creditors." The law looks alone to the legal effect of the instrument, and, if the trustee is a mere agent to carry out and enforce the lien of the creditors for whom the security is given, then the instrument is a chattel mortgage, and nothing else.

In this case, what is the trust which the trustee is to enforce for the benefit of creditors? It is simply to protect and enforce their lien upon the property. He can do so in no different manner than they could were the security given to them individually and separately. He has no greater power than they would have. The power of sale is the same, and the conditions are the same. The words, "in trust for said parties severally," might have been stricken out without detriment to the validity of the instrument. Warner would then, as he does now, stand merely in a representative capacity. The creditors assented to his so acting for them, and no fraud is perpetrated upon other creditors, and they have the same rights and remedies as they would have had if these secured creditors had been named mortgagees jointly, or had separate mortgages. This is quite different from an assignment. There the title of the property would have been conveyed, and a trustee would have stood between the unsecured creditors and the property of their debtor.

2. The instrument in this case does not purport to convey all of the debtor's property. As a matter of fact, as appears from the record before us, it did not cover all her property. But, if it had, it would not have had the effect to invalidate the security. A debtor, although insolvent, may secure a creditor for the payment of a pre-existing debt by a mortgage upon all his property, although he may have numerous other creditors who are unsecured. This doctrine has been so often and so repeatedly held by this court that the citation of authorities in support of it would be idle. Some of them are referred to in *Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573. The mortgagor is not prevented from placing in the mortgage property of greater value than the amount of the debt. If every mortgage was to be declared a common-law assignment, and therefore void, because it con-

tained all of the debtor's property to secure some creditor or creditors over others, or because the value of the property exceeded the amount of the debts secured, I venture to say that there is not a mortgage in the state of Michigan that is not void. If the value of the property greatly exceeds the debt secured, that fact may be considered as having a bearing upon the validity of the mortgage, as having been given with intent to defeat, delay, and defraud creditors; but it would not change the character of the instrument to a common-law assignment, and be therefore void in law. Neither the fact of insolvency, nor the knowledge of the debtor's insolvency on the part of the mortgagee, will defeat or impair a mortgage security taken for an honest debt. The right of a debtor to give security, and the right of a creditor to take security, for a bona fide debt, cannot be denied. In fact, insolvency, or impaired credit, or inability to pay, are the only reasons for requiring or taking security for a pre-existing indebtedness, and the creditor is not required to assert or prove his ignorance of the financial situation of the debtor at the time he takes the security. If the creditor asserted that he supposed that his debtor was solvent, we know, from the common experience of mankind, that nine out of ten times the assertion would be a falsehood, and the law does not require any such miserable subterfuge to justify the exercise of a legal right. The difference between a chattel mortgage and a common-law assignment is that one is a conditional transfer of property, and the other is an absolute transfer. From one the debtor, the attaching or execution creditor, or a subsequent mortgagee has a right to redeem; from the other there is no right of redemption. In an assignment both the title and possession of the property is vested in the assignee; in a chattel mortgage neither, until default and foreclosure, under the decision of *Lucking v. Wesson*, 25 Mich. 443, whatever may have been the effect of such a conveyance at common law.

It has been supposed that *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645, lends support to the idea that a chattel mortgage is an assignment if its effect "is to put the entire assets, legal and equitable, into the hands of a trustee for sale and distribution." But Mr. Justice Campbell in that case laid down no such doctrine. He was speaking of an instrument which transferred the legal title absolutely to a trustee for sale and distribution. The effect of that decision ought not to be open to misunderstanding, or a misconstruction, if attention is paid to what Mr. Justice Campbell stated the trust contained in the instrument was. He did not make any objection upon the ground that the instrument was made to Mr. Kendall in trust instead of to the creditors directly. It is not to be supposed that he intended to overrule what he had said in *Ad-*

ams v. Niemann, above quoted, upon that branch of the case. The trusts which he referred to were contained in the body of the instrument, and were plainly pointed out. Thus he says: "The trustee was empowered, if he should think it for the interests of the secured creditors, to continue the manufacturing business so as to get all materials on hand ready for market, and buy new stock, goods, merchandise, and materials, long enough to dispose of the property for the best advantage, and from the proceeds he was, first, to pay the expenses of the trust and sale and disposition of the property; second, to pay all debts to employees; third, to pay the other secured debts in full or pro rata; fourth, to pay the surplus moneys to the company. * * * By this document the trustee is expressly empowered to continue the business if he chooses, to go on and complete the manufacture of the stock, and to buy further material and goods to help on the profitable winding up of the business, and to dispose of everything as soon as reasonably practicable. And by this grant of powers it is evident that the company, having put everything in his hands, could not possibly do anything to pay debts or redeem the mortgage, while the intermingling of new and old business would deprive execution creditors of any means of getting a sale of the residue belonging to the mortgagor, if in fact there should be, as the law and the instrument both assume there might be, one. In other words, Mr. Kendall not only took an interest by way of security for debts which by law any execution creditor would have a right to redeem, but he also took title to the surplus, with power to manage and dispose; and a trust was created for the company which would not be subject to execution as a mere equity in the proceeds, and not an ownership in the property." It was for the reason that the instrument contained these trust powers, which operated as a transfer of the property, that Mr. Justice Campbell held the instrument not to be a chattel mortgage, but an assignment in effect. He noted and relied upon the distinction which I have stated between a chattel mortgage and a common-law assignment, and he placed no reliance whatever upon the ground that the mortgage was made to Kendall in trust for the benefit of the creditors, instead of to the creditors themselves. And, having held that it was an assignment, he says: "An assignment of all one's assets to an assignee for the benefit of creditors is within all the definitions of a general assignment. It is the completeness of the transfer that gives it character." He does not say that a chattel mortgage of all one's assets to a mortgagee for the benefit of certain creditors comes within all the definitions of a general assignment. Indeed, he has said to the contrary more than once. *Rollins v. Van Baa-*

len, 56 Mich. 614, 23 N. W. 332; Root v. Potter, 59 Mich. 506, 507, 26 N. W. 682.

In the Rollins Case the point was directly raised by a bill in equity charging that the giving of a single mortgage to secure two creditors, and another to secure another, upon all of the debtor's property, which was worth considerably less than the securities, was in effect an assignment of such property, and was void under the statute of 1879, above quoted. Upon the question thus squarely raised, Justice Campbell said, referring to the statute: "It should be construed as it reads, as applying only to what purport to be common-law assignments. If proceedings not in that form are claimed to be fraudulent as to creditors, they must be reached in some other way, and shown to be against some other policy. The law does not avoid honest transfers or securities which are not general assignments."

Root v. Potter was also a proceeding in equity where all the facts came before this court. In that case securities had been given by way of chattel mortgages which were executed on the 12th of July, 1884, and handed over to the mortgagees on the 15th, and filed on the 16th, late in the evening, and on the 16th the mortgagors executed a common-law assignment. These mortgages were attacked as being preferences, and also that they were given to hinder, delay, and defraud creditors. Under the latter claim, Judge Campbell said, referring to the statute against frauds: "Under these provisions of law, fraud was made a question of fact, and any creditor who obtained in good faith his security for an honest debt can hold it against any subsequent claim to attack it." He then said: "The question then arises whether the transactions were illegal, as amounting to unauthorized preferences under the assignment law; and it is a question which is supposed to be an entirely new one in this state. It is, however, upon such facts as appear to exist in the record before us, within well-settled and familiar principles. There is nothing in the assignment law which undertakes to avoid dealings previous to the assignment, whether near or remote in point of time, which were in no way connected with it in the intention of the parties. Retroactive operation which would divest lawfully vested rights is not in harmony with our laws. The statute only makes preferences void which are made by the assignment itself, and this, by the largest possible construction, cannot go beyond such acts as are done in such a time and manner as to be parts of the same transaction, and within the same disposition, whereby the debtor's entire estate is applied to the payment of all his debts. In other words, the preferences, to come within the language and meaning of the statute, must be made in separate form to avoid the effect which the statute would operate, of annulling them if they were included in the as-

signment itself. The assignment law shows no intent in the legislature to change the existing statutes against frauds, except in the one particular of preferences; and it would be a very dangerous and unfortunate rule, if it could be legally adopted, which would annul the dealings of honest persons with those whom they do not suspect of fraudulent or unlawful designs."

In Burnham v. Haskins, 79 Mich. 35, 44 N. W. 341, a bill was filed to declare a chattel mortgage executed contemporaneously with an assignment for the benefit of creditors void as an illegal preference. In that case, while holding under the testimony that the chattel mortgages were executed contemporaneously with the assignment, and were part of the same transaction, we expressly stated that we adhered strictly to the rule laid down in Root v. Potter, and have uniformly upheld security taken by a creditor for a bona fide debt, under circumstances and testimony that the creditor had no notice or knowledge that the debtor contemplated the making of a general assignment, or where the acts of making the assignment and giving the security were done in such a time and manner as not to be parts of one and the same transaction.

Sheldon v. Mann announces the correct doctrine, in these words: "The creditor has a right to secure and to collect his claim, even if he knows that his debtor is insolvent, and that by getting his claim paid he deprives other creditors of the opportunity to secure or collect their debts. At common law, a general assignment for the benefit of creditors could be made with preferences. Nor was the debtor compelled to make an assignment. He could dispose of his property as he saw fit in the payment of his debts, if it was all applied to such purpose; and, whether it was all so applied or not, whatever portion of it was applied to the payment of a bona fide debt could not be touched or disturbed by other creditors. The common law put a premium upon the vigilance of the creditor, and there are not wanting those who doubt to-day the equity as well as the wisdom of bankruptcy laws. And, under the law of this state, the debtor has the right to prefer one creditor over another by paying his debt in full or in part. This right is not affected by the debtor's insolvency, nor by the creditor's knowledge of such insolvency, nor by the fact that others may lose the entire amount of their debts credited upon the faith of the debtor's ownership of the property. As long as no assignment is made for the benefit of creditors, or the transaction does not amount in law to such an assignment, the debtor is at liberty to pay or secure any of his creditors at the expense of the others. It will be found that our statutes do not prohibit preferences unless an assignment commonly called 'common-law assignment' is made. How. Ann. St. § 8739; Rollins v. Van Baalen, 56 Mich.

614, 615, 23 N. W. 332. And there is no law compelling a debtor to make an assignment. As I understand the statute, if he makes such an assignment, he must do it in a certain way, and make no preferences; but, if he does not see fit to make an assignment for the benefit of his creditors, he can dispose of his property as he sees fit in the payment of his bona fide debts." In that case the debtor owed debts to Toledo creditors, which he secured by mortgages amounting to \$8,872.25. Of these, three were given to three separate creditors, whose claims amounted to \$7,616.29, and such mortgages were intended as a preference to those creditors, and it was the validity of these mortgages which was attacked, as being, in effect, a common-law assignment. They covered all of the debtor's personal property, and, indeed, all of his property, except his homestead and store, which were one building, and a piece of real estate called the "Rink." The homestead property and the rink were worth about \$1,800, and were subject to the homestead exemption of \$1,500. The mortgages in dispute were filed May 23, 1890. On the same day he executed a mortgage to his brother on his homestead and store property of \$1,000, and May 29th another mortgage on the rink property, to secure another Toledo creditor, for \$255.97. He gave four mortgages, which were filed May 23, 1890, another filed March 28, 1890, and seven others, which were filed June 3d of that year. These last-named mortgages secured debts in the aggregate of \$2,076.69. By these mortgages he appropriated all of his property for the payment of certain specified creditors, and left out creditors entirely unsecured, holding about the same amount of credits against him. The property was seized under the first three mortgages, and produced only \$5,416.66, being less than the amount of the debts secured by the first three mortgages. The facts in the case were quite fully stated and commented upon in the opinion of Mr. Justice Morse. Some of those facts, and the comments upon them, have been misapplied, and quoted and relied upon as limiting the principles of law enunciated in that case. As, for instance, it is argued that the creditor cannot take a valid security if he knows of the insolvent situation of his debtor; that his security is void if it covers all of the property of the debtor; thus overlooking the illustration and argument contained on page 274, 85 Mich., and page 575, 48 N. W., and also what was said as to the knowledge of the creditor of the debtor's insolvency, upon page 273, 85 Mich., and page 575, 48 N. W., above quoted. The opinion also states that no assignment was intended to be made. That is a fact that must appear outside of the instrument. It could not be gathered from the language of the instruments, for in form and effect they were chattel mortgages. Immediately following, it is stated that the mortgagees "ob-

tained their security honestly, and in the usual methods of business, without any thought of the assignment law. But whether they did so or not, whatever their motives or intent may have been, so long as the securities covered no more than the amount of their just and honest claims against Mann they have a right to the full benefit of such securities, unless the giving of these three mortgages upon the same day to separate parties can be declared, in law and in fact, to be a common-law assignment for the benefit of all his creditors. It plainly cannot be so declared or construed."

The case here under consideration falls directly within the principles laid down in *Sheldon v. Mann*, and should be ruled by it. The only difference is one that does not affect its character as a chattel mortgage, viz., instead of separate mortgages to each creditor, it names a third person as trustee; and this is permissible, as above stated, under the decisions of this state upon the subject, and was expressly held not to be fraudulent *per se* in *Bagg v. Jerome*, 7 Mich. 145. There ought to be and is some underlying principle from which to determine whether an instrument is a chattel mortgage or a common-law assignment. If the instrument is a conveyance upon condition, given as a security for a pre-existing debt, and contains no trust in the body of the instrument whereby the property is withdrawn from the right of the mortgagor or others to redeem, who ordinarily have such rights in cases of chattel mortgages, or whereby the title of the property is placed beyond the reach of execution as to any surplus, then the instrument is not an assignment, but a chattel mortgage. But if it conveys the absolute title to a trustee for the benefit of creditors, and thus places the property and surplus beyond the reach of creditors, it is a common-law assignment. *Kendall v. Bishop* was determined upon this principle, and so was *Root v. Potter* and *Sheldon v. Mann*.

The question as to whether the instrument is a chattel mortgage or an assignment for the benefit of creditors must in all cases be determined as a question of law upon the contents of such instrument, and not upon any testimony which appears outside of such instrument; and, unless the conveyance upon its face purports to convey all of the debtor's property to secure some creditors in preference to others by an absolute title upon its face, the court is not at liberty to declare it a common-law assignment; and if facts appear outside of the instrument itself which tend to prove that the execution of the instrument was made with the intention of having the effect of a common-law assignment, or with the intention of evading the statute, then it becomes a question of fact for the jury to decide, and not for the court. *Bagg v. Jerome*, 7 Mich. 145; *Butler v. Diddy* (Iowa) 49 N. W. 995. In the latter case it was held that "the statute providing that

no general assignment for the benefit of creditors shall be valid unless made for the benefit of all the creditors applies only to a general assignment, and does not apply to other conveyances. The execution of mortgages by an insolvent debtor, with the bona fide intention of securing particular creditors, does not operate as a general assignment for the benefit of creditors." And upon this proposition the court cites a number of Iowa cases. The supreme court of Iowa, like our court, has uniformly held that where mortgages were given in good faith, with the intention of securing creditors to whom they were executed, a different intention than what the parties had could not be given them by the court. And in the case last cited it was further said: "Where an insolvent executes a mortgage or mortgages, not for the purpose and with the intent of securing a pre-existing indebtedness, but intending the same for an assignment of all his property, divesting himself thereby of the title to all his property, and where the same is made in view of insolvency, such conveyance shall be treated as an assignment; but where an assignment is not intended by the parties to the transaction, and the intention is only to secure a pre-existing indebtedness, in such case the instrument is a mortgage, and should be treated as such, even though all the property of the debtor is taken, and he is left insolvent, and there are other creditors who have not been secured." This court has more than once declared that an insolvent debtor could not be compelled to execute a common-law assignment; but if this court can declare an instrument which upon its face is a chattel mortgage, creating only a lien upon the property, to be a common-law assignment, why is the debtor not compelled by the decision of this court into making a common-law assignment, and that, too, against his wish and intention?

The statute of 1879 does not attempt to compass the object and purpose of the insolvent law. It does not prohibit any preference to creditors, unless the preference is made in a common-law assignment. It contains no provisions for the discharge of a debtor from all liability in case he transfers and delivers over to his assignee for the benefit of all his creditors all of his property. If the debtor makes a common-law assignment, he is still liable for any balance that may be due to his creditors after his assets are applied by his assignee to the payment of his debts pro rata. The creditors are not compelled to accept the terms proffered in the assignment; they may stand aloof from the assignment, and may rely upon the liability of their debtor to pay. There is no provision for recovering preferences made on the eve of assignment. It is not either a bankrupt or insolvent law. It is of no practical use, and its only mission seems to be to beget litigation, and afford an opportunity for a creditor to obtain a preference over other creditors,

by asserting and occupying the inconsistent position of asserting that the chattel mortgage given to secure a bona fide debt is a common-law assignment, and therefore ought to be construed as such, and void as to creditors, while he attaches and levies execution, and thus obtains securities and preferences fully as unlawful and against the policy of the law. In *Crow v. Beardsley*, 68 Mo. 435, under a similar statute, the court held that, if the instrument was attacked upon the ground that it is in effect a common-law assignment, the creditor had no occasion to resort to an attachment, because he would have had equal rights under the deed with those named therein, and could by a proper proceeding have compelled the trustee to have discharged his duties under the assignment law. This court has not been as consistent, because of its efforts to harmonize the statute and protect the rights of creditors. We have commented upon the manifest imperfections of the statute in failing to provide suitable provisions for carrying out its design, and we have held that, under certain circumstances, the creditor might proceed by attachment. *Coots v. Radford*, 47 Mich. 37, 10 N. W. 69; *Beard v. Clippert*, 63 Mich. 719, 30 N. W. 323; *Wolf v. Skesson*, 83 Mich. 543, 47 N. W. 341.

The case of *Crow v. Beardsley* clearly distinguishes between cases where the instrument is given as a security for a bona fide pre-existing debt and where the property is absolutely appropriated to the payment of the debts. And the court held that the instrument, although in form of a trust-deed, yet, from the fact that it contained a clause of defeasance, was a mortgage, and could not be construed as an assignment, and that the statute could not be extended to include constructive assignments. The legislature of Illinois adopted a statute, of the provisions of which ours is a substantial copy, into the statutes of that state in 1877. Numerous decisions of their supreme court upon the intent and effect of the statute have been made. In *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. 903, it was held that, after the debtors had made up their minds to make an assignment of their property for the benefit of their creditors, all conveyances, transfers, and other dispositions of their property and assets, made in view of their intended general assignment, whereby any preference was given, would, in a court of equity, be declared void, and be set aside, the same as though incorporated in the deed of assignment itself. In this case preferential payments, conveyances, and confessions of judgment to relatives and favorite creditors were made in view of an intended assignment, which almost immediately followed. And it was held that such preferences were in fraud of the statute, and that the property so transferred passed under the deed of assignment to the assignee in trust for the benefit of all the creditors. But there is nothing in that

decision which supports the doctrine of constructive assignments, or that the series of preferences, transfers, and conveyances made by the insolvent in view of an early assignment would, in and of themselves, constitute an assignment. In *Weber v. Mick*, 131 Ill. 520, 23 N. E. 646, the court, alluding to the voluntary assignment act, said: "The subject-matter of the act was limited to voluntary assignments, and even if it had contained express provisions attempting to deal with or regulate involuntary assignments, or any subject other than the one embraced in the title, such provisions would have been void under the constitution, § 13, art. 4. For the same reason it must be held that every attempt to apply the act, or any of its provisions, by construction, to any subject other than voluntary assignments, must be wholly unavailing." And, speaking in regard to chattel mortgages executed by a failing debtor, the court said: "It is clear then that they did not constitute valid assignments for the benefit of creditors, within the meaning of the statute." And they further said "that they were mere chattel mortgages, executed for the sole benefit of the mortgagees, and creating no trust in favor of any of the creditors of the mortgagor." And in *Farwell v. Nilsson*, 133 Ill. 45, 24 N. E. 74, the supreme court of that state, adopting the opinion of Judge Moran of the appellate court, said: "We have no involuntary assignments, and we know of no principle of law operative in this state that limits or controls an insolvent debtor in the distribution of his assets, provided they are applied in the discharge of

bona fide debts." And again: "The statute relating to the assignment by debtors for the benefit of creditors, prohibiting preferences in such assignments, has no application to a case of this kind. Notwithstanding that statute, a debtor may pay one creditor in full either in money or by a sale of his property. That act applies only to conveyances of property to an assignee or trustee, in trust to convert the same into money for the benefit of the creditors of the assignor, which can now only be made under that law." And the court further said: "To give this act the scope and effect here contended for would be to far exceed the legislative intent. * * * The act contemplates no such thing as a constructive assignment, and that, before the county court gets jurisdiction, an actual assignment must be made and recorded, as required by the act." I am satisfied, however, that the judgment should be reversed upon other grounds. The question as to whether the indebtedness named in the mortgage existed, the extent to which it did exist, the good faith of such indebtedness, and whether the facts and circumstances attending the transaction had any tendency to substantiate the claim that the mortgage was executed with the intent to hinder, delay, and defraud creditors, should have been submitted to the jury, and the circuit judge was in error in not so doing. For this reason I think the judgment should be reversed, and a new trial granted.

McGRATH, J., did not sit. The other justices concurred.

WARREN v. DWYER.

(51 N. W. 1062, 91 Mich. 114.)

Supreme Court of Michigan. April 22, 1892.

Error to circuit court, Washtenaw county; E. D. Kinn, Judge.

Trover by Byron E. Warren against Charles Dwyer. Verdict was directed for plaintiff. Defendant brings error. Affirmed.

MORSE, C. J. The plaintiff sued in trover to recover the value of certain lumber and shingles, and a verdict was directed in his favor for \$1,180.80. This case is ruled by *Stelden v. Mann*, 85 Mich. 265, 48 N. W. 573. See, also, *Warner v. Littlefield* (Mich.) 50 N. W. 721, and *Fitzgerald v. McCandlish*, *Id.* 869. The facts are substantially as follows: Prior to 1887, Samuel W. Parsons and George W. Parsons were in partnership in Ypsilanti, running a planing mill. In that year Samuel W. bought out George W., and assumed the indebtedness of the firm. Soon after Samuel W. made an oral agreement with his wife to enter into partnership, under the name of S. W. Parsons & Co. The wife put no money or property into the business, and there was no agreement how much she should contribute, but it was understood that she was to be an equal partner. Quite a large amount of the indebtedness of the old copartnership between Samuel W. and George W. Parsons was to the father of Mrs. S. W. Parsons, and it was talked that, when her father died, the part coming to her, as heir at law, would be in the business. When the father died, part of this indebtedness was paid to the other heirs by giving the notes of S. W. Parsons & Co. November 20, 1889, Parsons and his wife, doing business under the firm name of S. W. Parsons & Co., executed a chattel mortgage to secure certain creditors upon a portion of the copartnership property, and filed the same. This was done without the knowledge of the creditors secured, but they were immediately notified of it by Mr. Parsons, and in a few days accepted the security. Upon the execution of this mortgage, Parsons requested one Edwin C. Warner to take possession of the property, and act as trustee for the creditors named in this mortgage, which he did. When the creditors first came to Ypsilanti they made arrangements with Warner to hold the possession for them for a few days, as their agent, which he did. The creditors met subsequently, and appointed the plaintiff as their agent to foreclose the mortgage, which he proceeded to do. After this first mortgage was made, Parsons found that he had unintentionally left out some creditors that he meant to have named in the first mortgage, and he and his wife executed another mortgage, November 21, 1889, covering the same property, securing the parties named in the first mortgage, and also the others that he had inadvertently omitted from it.

November 29, 1889, they executed another mortgage to McCullough Bros. on patterns and flasks in their possession; and also a mortgage covering stock, book accounts, machinery, and fixtures to secure a number of creditors whose names appear in said mortgage. Parsons asked the creditors named in the first mortgage to share pro rata with those additionally named in the second mortgage, but they refused to do so. The lumber and shingles involved in this suit were covered by the first mortgage. While it was in the possession of Edwin C. Warner, but after he had been made the agent of the creditors named in the first mortgage, the defendant, as sheriff of Washtenaw county, levied upon it by virtue of a writ of attachment in favor of Sawyer, Goodman & Co., and against S. W. Parsons & Co., and sold it on execution upon judgment subsequently taken in such attachment suit. The persons named as beneficiaries in this first mortgage, before suit, assigned their cause of action against the sheriff to the plaintiff, and authorized him to prosecute the same in his own name. There was no evidence tending to show any fraud in the making of this first mortgage, or any of the others, nor any testimony tending to show that any of the debts thus secured were not bona fide obligations. The giving of these mortgages did not constitute a fraudulent assignment, but was a legitimate transaction, for reasons stated in the cases above cited. It is claimed that individual debts of Samuel W. Parsons were included in this mortgage upon the partnership property, but the proofs show that these debts were incurred by Parsons for the benefit of the copartnership, and were really partnership obligations, and had been assumed as such by the firm.

It is further contended that, as the plaintiff did not allege in his declaration the assignments of the mortgagees' rights of action to him, they could not be introduced in evidence; that he could not recover under his declaration, which was in the usual form in trover, under the proofs in the case; citing the following cases: *Draper v. Fletcher*, 26 Mich. 154; *Rose v. Jackson*, 40 Mich. 30; *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708; *Blackwood v. Brown*, 32 Mich. 104; *Cilley v. Van Patten*, 58 Mich. 404, 25 N. W. 326; *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. 758. These cases do not apply. In replevin and trover there is an authorized form of declaration for each action which is ordinarily used, and which has been held sufficient in each respectively. These declarations do not undertake to notify defendant of the nature of the plaintiff's title, or what are the evidences of it. These are matters of evidence merely. *Harvey v. McAdams*, 32 Mich. 472; *Myres v. Yapple*, 60 Mich. 339, 27 N. W. 536; *Williams v. Raper*, 67 Mich. 427, 34 N. W. 890; *Hutchinson v. Whitmore* (Mich.) 51 N. W. 451. The judgment of the circuit court is affirmed, with costs.

The other justices concurred.

ARMSTRONG et al. v. COOK.

(54 N. W. 873, 95 Mich. 257.)

Supreme Court of Michigan. April 10, 1893.

Certiorari to circuit court, Sanilac county; Watson Beach, Judge.

Attachment by Silas Armstrong and Albert A. Graves against Henry A. Cook. Defendant moved before a court commissioner to dissolve the attachment, which was granted, and plaintiffs appealed to the circuit court. From an order of the circuit court reversing the order of the commissioner, defendant brings certiorari. Reversed.

Dickinson, Thurber & Stevenson and J. B. Houck, for appellant. Avery Bros. & Walsh, (Farley & Aitkin, of counsel) for appellees.

GRANT, J. The defendant was a country merchant doing business in the village of Crosswell, in Sanilac county. Plaintiffs were merchants in Port Huron, and had sold goods to the defendant to the amount of \$243, only \$77 of which were due at the time this suit was instituted. November 12, 1890, plaintiffs sued out a writ of attachment, and caused it to be levied upon defendant's entire stock, which was then worth about \$4,000. They gave a bond in attachment for only \$200. Defendant moved before a circuit court commissioner for a dissolution of the attachment, which was granted. Plaintiffs appealed from the decision of the commissioner to the circuit court, which reversed the action of the commissioner, and held there was sufficient ground for issuing the attachment. Plaintiff Graves made the affidavit for the attachment, in which the sole ground alleged to justify the issuance of the writ was that he had good reason to believe that defendant was about to assign and dispose of his property with intent to defraud his creditors. Graves went to Crosswell November 11th, to see Mr. Cook. Mr. Cook was embarrassed, and had not then the money with which to pay his indebtedness. He had gone to Detroit to see his creditors there with a view to arrange an extension of time. His principal creditors were in Detroit. Mr. Cook had a clerk and a boy in the store. The clerk was then sick, and when Mr. Cook went to Detroit the night before, he requested Mr. Houck, who kept his books, to look after the business in his absence. Mr. Graves testified that the sole reason he had for believing that Cook was about to dispose of his property with intent to defraud his creditors, was

that he learned that Cook had given a mortgage to his wife on September 19th previous for \$1,540; that \$900 or \$1,000 in drafts had been returned; that he had taken his ledger, and gone to Detroit, to fix the matter up. While in Detroit, Cook arranged with his creditors there to execute a mortgage to one Elliott, to secure the indebtedness due them, and to cover future advances. He returned from Detroit on the evening of the 12th, and on the next day executed this mortgage. The sole question is whether there was any evidence to sustain the attachment proceeding, and to support the allegation in the affidavit upon which the writ was issued. We think the evidence shows no intent on the part of Cook to defraud his creditors. The mortgage to his wife was given for a valuable consideration, to secure her for money which she had loaned her husband, and which had gone into the original purchase of his stock of goods. At the request of his creditors he tried to induce her, though she was then sick and upon her deathbed, to release her mortgage, which she declined to do. He had very naturally and properly taken his ledger to Detroit, in order to show his creditors there his financial condition. The indebtedness to his Detroit creditors, secured by the mortgage to them, was bona fide, and they were willing to extend the time, to furnish him more goods, and to permit him to pay some of his small debts before paying them. None of the provisions of this mortgage were per se fraudulent, as claimed by plaintiffs' counsel. Mr. Cook had a right to mortgage all his property to secure a past bona fide indebtedness and future advances. The statement in the mortgage that it should be a continuing security until discharged by writing, and, at the option of the party of the second part, should be as binding in all respects upon the assigns of said business of the first party, or any of them, as if made by them or him in person," is no badge of fraud. This clause only states the legal effect of the mortgage. Without it the security would have continued until discharged, and would have bound the assigns of the mortgagor. The power to sell at public or private sale, and the power to remove the goods to other places for sale in case of default, are not unusual provisions in chattel mortgages. It was undoubtedly understood and contemplated that the stock might be sold to better advantage in some other place than in the small village of Crosswell. Judgment reversed, and the attachment proceeding quashed. The other justices concurred.

NUGENT v. NUGENT et al.

637 N. W. 706, 70 Mich. 52.)

Supreme Court of Michigan. April 27, 1888.

Appeal from circuit court, Kent county, in chancery: R. M. Montgomery, Judge.

Bill by James Nugent, as judgment creditor of defendant Daniel Nugent, to set aside a conveyance by Daniel to defendant Emanuel Nugent as in fraud of creditors. Complainant had judgment, and defendant Emanuel appeals.

Taggart, Wolcott & Ganson, for appellant. John C. Quinsey and James Nugent, for appellees.

LONG, J. The facts in this case are very well stated by counsel for defendant, and are as follows: "The bill of complaint in this case is filed by James Nugent as judgment creditor of Daniel Nugent, one of the defendants, to set aside a deed of lands made by Daniel to Emanuel, upon the alleged ground that said conveyance is fraudulent and void as to the creditors of the said Daniel. As we understand it, the case turns upon questions of law, and nearly all of the more material facts are either conceded or established by clear admissions of the party against whom they weigh. Outlined briefly, they are as follows: In the spring of 1879 the defendant Daniel Nugent was a single man, 34 years old, living with his aged and widowed mother, and a brother and sister, (both invalids and unmarried,) upon the old family homestead, an 80-acre farm in the township of Cannon, in Kent county. Since some time in April, 1877, Daniel had held the legal title to this farm, subject (1) to a lease of the same to Mary Nugent, his mother, for the term of her life; and (2) a lease of the south half of the same to his brother John, which was to take effect at the death of his mother, and continue for the life of the said John Nugent; and (3) subject, further, to a mortgage for \$1,000, given in 1877 for the benefit of his sister Cecilia, upon which there was about two years of interest accrued. He also owned 120 acres adjoining the homestead, which was incumbered with mortgage to James Nugent, the complainant, for \$3,200 and accrued interest. Daniel had been working the farm, and taking care of the family, under some arrangement with his mother, who held the life-lease. The defendant Emanuel Nugent is an elder brother, who was living upon his own farm in the adjoining township of Grattan, about four miles from the old homestead. Daniel had become dissatisfied with his surroundings, and April 30, 1879, he left, stating that he was going to Colorado and the mining country of the west. Before his departure he deeded all his lands to Emanuel, and also gave him a bill of sale of his farming tools, stock, and other personal property, amounting to \$1,000 or \$1,200 in value. Emanuel expressly assumed the mortgage for \$3,200, and took the 80-acre farm subject to the \$1,000 mortgage

and the two life-leases, and he also assumed certain debts of Daniel, amounting to about \$300, and including, so far as appears, all of Daniel's unsecured debts, except about \$800 or \$1,000 of notes in the hands of his mother and brothers. After his departure, Daniel wrote quite often to different members of the family, up to August or the 1st of September, 1879, at which date two letters, written at Leadville, Col., were received. Nothing has been heard from or of him since then, except vague rumors, though a good deal of effort has been made, by advertising in the newspapers and other means, to obtain information as to his fate. When Daniel went away, about the 30th of April, 1879, complainant was a law student at Ann Arbor. About the 1st of June he came to the homestead in Grattan, and stayed some weeks, leaving July 6 or 7, 1879, after a somewhat stormy talk with Emanuel, in which he was charged by Emanuel with stirring up trouble, which he denied, and retorted with charges of like nature against Emanuel. In the spring of 1880, the complainant, with full knowledge of the whole matter, settled with defendant Emanuel, and received a deed of the 120 acres covered by his mortgage from Daniel, in full satisfaction of that mortgage and notes, then amounting to \$3,400, or upward. He has since sold and conveyed the greater portion of these lands to third parties, who have conveyed to still others. In September, 1880, the said Mary Nugent, the mother of the parties to this suit, together with her two sons, Joseph F. and John, and her daughter, Cecilia, filed their bill of complaint by the said James Nugent, their solicitor, in the circuit court for the county of Kent, in chancery, against said Emanuel Nugent as defendant; alleging, among other things, that the conveyance of said property, real and personal, from Daniel, was made and received in trust for the payment of the debts and obligations of said Daniel, and more especially the debts owing to the complainants in said suit. This bill was held bad on demurrer, and was dismissed by the complainants on their own motion, rather than to amend. In August, 1882, complainant, James Nugent, acting in the name and on behalf of Mary Nugent, his mother, began an attachment suit against Daniel Nugent by filing his affidavit in the circuit court for the county of Kent which finally resulted in the judgment and levy which are set out in the bill of complaint in this case. The original bill was filed by Mary Nugent as complainant, but James Nugent, who is the complainant in the final bill of revivor and supplement, came into the case under an assignment of said judgment, and the notes on which it is based. After hearing on pleadings and proofs, the circuit court made a decree substantially as prayed in the bill, except that it reduced the amount of complainant's lien to \$1,161.74. From this decree defendant Emanuel Nugent appealed to this court."

There are several distinct grounds of objec-

tion to the decree of the circuit court. The judgment which this bill is filed to enforce was recovered in a suit began in August, 1882, by attachment against a non-resident defendant, who was not served with process, and who never appeared in any manner in the cause. It is claimed that the proceedings in this attachment suit did not comply with the requirements of the law. The affidavit for attachment was made and filed August 4, 1882, and the writ issued the same day, returnable September 5, 1882. The statutory notice of attachment was published for six weeks beginning September 28, 1882, and proof of publication was filed December 28, 1882. The declaration was filed September 2, 1882, which was prior to the return-day of the writ, and three months and twenty-six days before the filing of the affidavit of publication of notice of attachment. The declaration was prematurely filed. Section 8005, How. Ann. St., provides: "If a copy of the attachment shall not have been served upon any of the defendants, and none of them shall appear in the suit, the plaintiff, on filing an affidavit of the publication of the notice hereinbefore required, for six successive weeks, may file his declaration in the suit, and proceed therein as if a copy of such attachment had been served upon the defendants." In suits by attachment, where no personal service of the writ has been obtained, and the defendant has in no manner appeared in the cause, a strict compliance with statutory requirements is essential to the validity of the judgment. In *Woolkins v. Haid*, 49 Mich. 299, 13 N. W. 598, the declaration was filed four days prior to the filing affidavit of publication of notice of attachment, and this court held the judgment void. In *Steere v.*

Vanderberg (Mich.) 35 N. W. 110, the writ of attachment was issued September 5, 1884, returnable September 12, 1884. Declaration was filed November 21, 1884, and affidavit of publication of notice of attachment was filed November 29, 1884, the affidavit being filed eight days after the filing declaration, and this court held the declaration prematurely filed, and the judgment void. In the above case, Mr. Justice Champlin said: "It is a settled rule of law that all exceptional methods of obtaining jurisdiction over persons not found within the state must be confined to the cases and exercised in the way precisely indicated by the statute; and it may also be regarded as settled law that a failure to comply with statutory requirements, when the jurisdiction conferred is special, and no personal service is obtained, renders the judgment null and void;" and citing *Thompson v. Thomas*, 11 Mich. 274; *King v. Harrington*, 14 Mich. 532; *Millar v. Babcock*, 29 Mich. 526; *Johnson v. Delbridge*, 35 Mich. 436; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657. The proceedings may be attacked collaterally. *Millar v. Babcock*, 29 Mich. 526; *King v. Harrington* 14 Mich. 532. This case must be ruled by the foregoing cases. The judgment upon which this proceeding is founded must be held void and of no effect. As only a judgment creditor could maintain this bill, it follows that the case must fail, and we need not discuss the other questions raised. The decree of the court below must be reversed, and a decree entered in this court dismissing complainant's bill, with costs of both courts to defendant.

CHAMPLIN and MORSE, JJ., concurred. SHERWOOD, C. J., did not sit.

TROWBRIDGE et al. v. BULLARD.

(15 N. W. 1012, 81 Mich. 451.)

Supreme Court of Michigan. June 13, 1890.

Appeal from circuit court, Van Buren county; George M. Beck, Judge.

Mills, Osborn & Goss, for appellant. *E. R. Annable*, for appellees.

LONG, J. There is no controversy over the facts in this case. As they appeared upon the trial in the court below, they are substantially as follows: On the 22d of September, 1888, Messrs. Clark, Baker & Co., who were wholesale grocers at Jackson, in this state, had a claim against one Frank Potts, of Decatur, and to recover and collect it commenced a suit by attachment in the circuit court for Van Buren county. The writ of attachment was delivered to James F. Bullard, who was then the under-sheriff of the county of Van Buren. On the 22d day of September, Bullard attached a quantity of property, consisting largely of teas, as the property of Frank Potts; the same being then in the custody of Trowbridge & Roberts, who claimed to have purchased it of Potts. It was claimed that Potts had fraudulently disposed of the property to Trowbridge & Roberts, to cheat and defraud his creditors. The officer was unable to find Potts within his county, and could not make personal service of the attachment upon him. The writ of attachment was in all respects properly returned; and on the 13th day of October, 1888, a notice was published of the issuing of the attachment pursuant to law. On the 28th of November, proof of publication of said notice of attachment was made. On the same day an affidavit was filed of the non-appearance of the defendant Potts, and the plaintiffs also filed their declaration. On November 28th the default of Potts for want of appearance was entered. On November 30th such default was made absolute. On December 12, 1888, a judgment was rendered in favor of Clark, Baker & Co., and against Potts, for \$206 and costs. On the 13th day of December, 1888, execution upon such judgment was issued and delivered to Bullard, who on the 17th day of December levied upon the same property which he had attached, and, after giving a proper and sufficient notice, sold the property to Clark, Baker & Co., the plaintiffs in the attachment suit, on the 5th day of March, 1889.

On March 5, 1889, Theodore Trowbridge and Lewis D. Roberts commenced a suit in the circuit court for Van Buren county against James F. Bullard by summons, and on May 1, 1889, filed a declaration as against him, in trover, for the property in question. The defendant appeared on the 15th of May, and filed a plea of the general issue, and gave notice of the justification under the attachment proceedings, and also under the levy of said execution. At the trial, Theodore Trowbridge was sworn in behalf of the plaintiffs, and gave evidence tending to show the purchase of the property by himself and his co-plaintiff, Roberts, of the defendant Potts. Upon cross-examination, it was sought in behalf of the defendant to show that this sale was

fraudulent, and made with intent to cheat and defraud the creditors of Potts. The plaintiffs' attorneys objected to this, and the court ruled that the testimony was inadmissible, and not proper cross-examination, as the case stood under the statement of counsel. The plaintiffs also gave evidence tending to show the value of the property, and rested their case. Upon the part of the defendant, the proceedings in attachment were offered in evidence, and some testimony was given controverting that introduced upon the part of the plaintiffs as to the value of the property. The plaintiffs then introduced in evidence the balance of the proceedings in the attachment suit, including the judgment, execution, and the levy and sale thereunder. It will be seen that the default of the defendant was entered within three days after the filing of the plaintiffs' declaration therein, and that the judgment was entered within twelve days of that time. It is conceded by defendant's counsel that the judgment, and the proceedings thereunder to sell the property, are void. The defendant, however, claimed the right to justify under the attachment; insisting that, if the judgment was void, the attachment was still valid in his hands, and an ample and sufficient justification to him, provided it could be shown that the sale to the plaintiffs was fraudulent, and that the property attached was liable to attachment by the creditors of Potts. The court held, however, that the defendant could not justify thereunder, and directed the jury that, if they found the property had been sold by Potts to Trowbridge & Roberts, they (the plaintiffs in the action) would be entitled to a verdict for the value. Verdict and judgment was given for plaintiffs for the value of the property. Defendant brings error.

The only question raised is whether, under the circumstances, the defendant was entitled to attack the transfer of the goods to the plaintiffs as fraudulent, though the judgment upon which the execution issued was void. It is claimed by counsel for the defendant that, though the judgment, and execution, levy, and sale thereunder, were void, yet that the attachment remained unimpaired, and the officer had the right thereunder to show that the alleged purchase by Trowbridge & Roberts was fraudulent. The only evidence which defendant offered which was excluded by the court was his proposal to show that the purchase by plaintiffs from Potts was fraudulent as to his creditors; and the title of plaintiffs to the goods in controversy was not attempted to be impeached upon any other ground. The claim, therefore, was that, inasmuch as the defendant had on September 22, 1888, seized and taken these goods from the possession of Trowbridge & Roberts under a valid writ of attachment issued against Mr. Potts, he could attack the title of Trowbridge & Roberts as fraudulent against the creditors of Potts, though he had not followed up the writ of attachment to judgment. It is further insisted that the case must be governed by its *status* at the time the plaintiffs' suit against the defendant was commenced, and that at that

time no unreasonable time had elapsed after the period at which a valid judgment might have been entered; that, when property is seized under attachment, it is in the custody of the law, and the officer is bound to produce it to satisfy any judgment which may be obtained in the proceeding, and the officer may justify under it, and therefore it is a protection to him. But the difficulty of this position is that the officer is not only seeking to justify his action in holding the property this length of time, but is also endeavoring to assail the title of others. He has not seized goods in the hands of Potts, the defendant in the writ, and confessedly owned by him; but he has taken goods away from Trowbridge & Roberts, to which they assert title under a purchase from Potts, and is seeking to hold them on the ground that, by virtue of a writ against Potts in favor of certain of his creditors, he is in position to contest the right set up by the plaintiffs. The rule is that judgment creditors may contest the title in such cases, but that the general creditors cannot do so. It has many times been held by this court that general creditors, having no judgment or lien on the debtors' property, cannot attack conveyances or other dealings for fraud. *McKibben v. Barton*, 1 Mich. 213; *Maynard v. Hoskins*, 9 Mich. 485; *Tyler v. Peatt*, 30 Mich. 63; *Griswold v. Fuller*, 33 Mich. 268; *Stoddard v. McLane*, 56 Mich. 11, 22 N. W. Rep. 95; *Root v. Potter*, 59 Mich. 498, 26 N. W. Rep. 682; *Scott v. Chambers*, 62 Mich. 532, 29 N. W. Rep. 94; *Krolik v. Root*, 63 Mich. 562, 30 N. W. Rep. 339. It is undoubtedly true that, had this action been brought before a reasonable time had elapsed for the taking of judgment and issue of execution, the officer holding the writ of attachment, and representing the parties in interest, might have attacked the *bona fides* of the plaintiffs' purchase. The fact that an attachment is issued before the debt is conclusively established on which it is founded, and that it may subsequently be shown by the defendant in the attachment that there is no such debt, is not sufficient reason for holding that the attaching creditor cannot show that the property attached is in fact the debtor's, when sued for it by a third person, who claims it by a title which is fraudulent as against the attaching creditor. Such third person may show that no such debt existed until it is established by a judgment in the attachment suit. He may therefore defeat the attaching creditor on either of two grounds: (1) That there was no debt to justify the issuing of the attachment; (2) that he had a good title to the property in dispute when it was attached. Of course the officer must first prove the existence of the debt for which the attachment was issued, when such debt has not been established by a judgment against the debtor. When that is done, the judgment proves it. *Rinehey v. Stryker*, 28 N. Y. 51. In the present case, however, there was no testimony given or offered to be given, on the part of the defendant, that Potts was indebted to Clark, Baker & Co., the plaintiffs in the attachment suit. The judgment was offered in evidence by the plaintiffs for the purpose of showing its

irregularity, but it appears that the judgment was void. It did not prove the indebtedness. It may be that counsel for defendant was misled as to their rights under the writ by the opinion and ruling of the trial court. It was the opinion of the court that, though the attachment was a valid one, yet, when the officer took the property under the execution, he no longer held it under the attachment, any more than as if he had turned it over to another party; that his attachment was ended, and that, the judgment, execution, levy, and sale being void, the officer was not in a position to contest the plaintiffs' title to the property; and that the only question open for contest was the value of the goods attached. Counsel for defendant took exception to this ruling, and desisted from further cross-examination of plaintiffs' witnesses. However, when he came to make his direct case in his defense, he utterly failed to show, and made no effort to show, that Potts was indebted to Clark, Baker & Co., the plaintiffs in the attachment. The defendant, under any circumstances, had no right to attack plaintiffs' title for fraud until he showed his lien under the attachment, and proved the debt against Potts. This fact justified the verdict and judgment rendered in the case.

But the circumstances shown upon this record did not warrant the claim made by defendant's counsel. The attachment was issued and levied on September 22, 1888, and the present suit was not commenced until March 5, 1889. In the mean time the defendant had sold and disposed of all the property held under the writ. This property was taken and sold by virtue of this void execution. Nearly six months had elapsed from the time the property was taken from the plaintiffs' possession before the suit to recover its value was commenced. The action is in trover for a conversion of the property. The property was not in the custody of the law at the time the suit was commenced. Neither was it at that time held under legal process. The writ of attachment, though valid, had performed its office. Under it the property had been held to await the time of its being turned over, and to be levied upon by the execution. It was so levied upon and taken out of the protection of the writ of attachment. The execution, as has been seen, was void, and was therefore no justification to the officer to take the property, and hold it or sell it, against the rights of the plaintiffs. If the officer could justify the holding under an attachment under such circumstances at the end of six months, then he might do so at the end of a year or of five years. The office of the writ of attachment is to hold the property until the coming of an execution to enforce the judgment against the property of the debtor, so that the debtor may not put his property beyond the reach of such creditor when he shall obtain his judgment; but the creditor has no right to hold the property beyond a reasonable time to obtain his judgment and issue and levy his execution, and the attachment is no justification to the officer in selling and disposing of the property, unless it is done under the execution thereafter issued. The

writ of attachment confers no right to sell the property except in special cases, when ordered by the court. The officer had sold the property on a void execution, and applied the proceeds upon a void judgment. The sale and conversion of the property under this void writ of execution was unlawful, and the officer must be held liable

in this action of trover. *McGough v. Wellington*, 6 Allen, 505; *Sawyer v. Wilson*, 61 Me. 529. There was no error in the ruling of the court, under the circumstances here stated; and the defendants offered no proof which would, if admitted, have amounted to a justification. The judgment must be affirmed, with costs.

GRAY v. FINN et al.

(55 N. W. 615, 96 Mich. 62.)

Supreme Court of Michigan. June 16, 1893.

Error to circuit court, St. Clair county; Arthur L. Canfield, Judge.

Action by Samuel J. Gray against John E. Finn and another to replevin property. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Frank Whipple, for appellant. P. H. Phillips, for appellees.

GRANT, J. Defendant Finn was collector of taxes for the Fourth ward of the city of Port Huron. By virtue of his tax warrant he levied upon certain personal property, as belonging to one Lewis Potts, to satisfy a personal tax assessed against him. Plaintiff, claiming to own the property, brought this action of replevin to recover it. As evidence of title he introduced a bill of sale from Potts to him. The court instructed the jury as follows: "It is the claim of plaintiff that at the time when the property was taken he was the owner of it; that he had a bill of sale of the same from Lewis Potts, who had been previously the owner of most of the property; and that by virtue of that he was entitled to possession. The defendants, on the other hand, claim that at the time of the commencement of this suit the property in question was owned by Lewis Potts, and in his possession, and not the property of plaintiff, or in the possession of plaintiff. It appears that, at the time the property was taken by Mr. Finn and the other defendants, it was here, in the city of Port Huron, situate in a barn; and it is the claim of plaintiff that at that time it was in his possession; that he had it in his possession, and under his bill of sale. The defendants claim that as a matter of fact it was not in his possession, but was at the time the property of Mr. Potts, and was in the possession of Mr. Potts; that the plaintiff was Mr. Potts' hired man, and was taking charge of the horse, as usual,—as he had before he claims to have bought it,—and as usual for a man in his situation to be taking care of it. Now, in regard to the question of fact, as to the ownership and actual possession, and right of possession, of this property, it is for you to determine, from all the facts and circumstances of the case. The claim of defendant, you will understand, is that the transaction between Potts and Gray was simply a pretense; that

it was a bill pretending sale, for the purpose of having it said that the property belonged to Mr. Gray, in order that Mr. Potts might avoid the payment of his taxes. On the contrary, Mr. Gray claims it was an actual transfer to him, in good faith. Now, as to whether it was a mere pretense is a matter for you to determine from all the facts and circumstances in the case. You should consider all the testimony that has been given in view of the transaction, in the light of the circumstances, and satisfy yourself, as ordinary, unbiased men, what the truth is in that regard; and if the property is not the property of Mr. Gray, and was not in the possession of Mr. Gray, at the time it was taken, then the defendants would be entitled to a verdict in this case." The court further instructed the jury that if they found that plaintiff was the owner of the property, and entitled to the possession, their verdict should be for the plaintiff, but if they found that he was not the owner, and not entitled to the possession, but that Mr. Potts was owner and in possession at the time the property was seized by the defendant, then their verdict should be for the defendant.

Under the evidence and the charge of the court, the jury settled the following facts: (1) That the title and possession were in Mr. Potts; (2) that the pretended bill of sale was given with no intention to pass either title or possession to plaintiff, but that it was given for the express purpose of preventing a levy by the tax collector. There was ample evidence to sustain the verdict. Only judgment creditors can assail a transfer of property by a debtor as fraudulent, and a valid judgment is necessary to enable the creditor to make the attack. *Millar v. Babcock*, 29 Mich. 526. But we do not think this rule obtains where the person against whom a tax is assessed makes a pretended sale of the property for the express purpose of preventing a levy, retains possession of it, receives no consideration, and the pretended vendee participates in the fraud, and takes the bill of sale, in order to assist in defeating the collection of the tax. Such party stands in no better position than his pretended vendor to contest the validity of the tax. Otherwise the statute (How. St. § 8318) which prohibits replevin for property seized by virtue of a tax warrant could be very readily evaded. The question as to the validity of the tax warrant therefore becomes immaterial. Judgment affirmed. The other justices concurred.

WEBBER v. JACKSON et al.

(44 N. W. 591, 79 Mich. 175.)

Supreme Court of Michigan. Jan. 17, 1890.

Appeal from circuit court, Saginaw county; C. H. Gage, Judge.

S. G. Higgins, (Wisner & Draper, of counsel,) for appellant. William H. Sweet, for appellees.

CAMPBELL, J. Complainant filed a judgment creditor's bill in aid of execution, and to reach equitable assets. On the 26th of September, 1884, he recovered a judgment in a suit upon a former judgment indebtedness against Andrew E. Jackson for between seven and eight thousand dollars. In April, 1884, while this suit was pending, it is claimed by defendant Timothy W. Jackson that he bought in good faith, and for a complete valuable consideration, a considerable amount of real estate in Saginaw county from his brother Andrew, being the land levied on by complainant; the consideration being \$6,737.74 of past indebtedness given up.

The validity of this alleged arrangement is the only important question before us. If that was valid, there seems to be nothing else to get at as equitable assets or personality. If it was not valid, its rescission involves the subsequent dealings in regard to rents, and other incidental profits and property, based on the ownership of the land. The defendant Andrew E. Jackson, instead of answering the bill seriously, filed a so-called "answer" which is full of impertinence, in the popular as well as the legal sense of that word, which deserves censure. As no answer under oath was asked, it amounts to nothing, except so far as it professes to show the nature of the transfer to Timothy; and in this it is not clear. Timothy, who is the defendant chiefly interested, ostensibly claimed to be a *bona fide* purchaser for valuable consideration. His answer amounted to no more than an assertion of the fact, without explanation. But, instead of averring the fact that there was a conveyance, and that it was for value, he contents himself with saying that the conveyances, "if any were made by said defendant Andrew E. Jackson to this defendant, were made in good faith, and for a valuable consideration." Such an answer is not only without point, but it asserts no rights whatever in defendant, and is a circumstance of some meaning. Complainant put Andrew on the stand, and in a long examination, in which direct and cross-examination alternate frequently, the defense is, rather shadowed out than plainly sworn to, that in April, 1884, Andrew went to the state of New York, at Timothy's request, and had an accounting with Timothy, and arrived at a balance due of the sum stated. It is not suggested or shown that Andrew had any counter-claims. The amount of debt is said to have been figured up by adding together several notes and express receipts, which are produced and identified by Andrew, but not by Timothy, who, however, says

the amount named in the deed was due for loans. None of those items accrued within the period of limitation, except one. All the items of notes were, with that exception, dated in 1874, 1875, and 1876, and payable at from 10 to 30 days, except one, of December 5, 1874, for \$130, at six months. Among these notes was one 30-day note, of \$3,477.17. None of them had any place of payment. In each of them the word "order" had been changed to "bearer," which is a very uncommon thing in such business. Most of them had no appearance of handling. All were on the same printed or lithographed form, got up some years before, in the days of revenue stamps; and most of them had the left-hand ornamental portion torn off, wholly or partially. There is no explanation why they, or some of them, had never been demanded or discussed during their legal life. There was no attempt to show that any of these notes represented any particular money or other transaction. None of them was identified by Timothy; but he did swear that all of the notes and other evidences of debt were surrendered to Andrew in the spring of 1884, when in New York, and that the settlement was then completed,—which is not true, literally, at least. In this connection it may be noted that while, according to both parties, the settlement was the result of urgency from Timothy, which seems to have been a single instance of solicitude after many years of quiet, and both say it was completed, no writing was made on either side, and no haste was shown in conveying. A paper is produced, purporting to be a letter from Timothy to Andrew, dated May 10, 1884, and within two weeks of the alleged statement, as follows: "Mr. A. E. Jackson—Sir: As you have executed the deed of property to me as you said you would when here, now see if you can find any one to lend money and fill out mortgage, and send to me, and I will execute it, and return. I want \$1,200 or \$1,500 dollars, five or ten years. TIM W. JACKSON." Timothy does not refer to this in his testimony. Andrew, according to his testimony, never wrote him on business after his return to Michigan. No attempt seems to have been made to borrow money, and nothing more was said by any one concerning this matter. The testimony shows both defendants to be intelligent men, of some business experience. At this time the deed was not made. Andrew, at sometime or other, drew it up himself. He did not get his wife to execute it. It was dated April 28, 1884, but was not witnessed or acknowledged until June 23d, when it was recorded. It was never sent or delivered to Timothy; and it does not appear whether he heard of it at all before suit. Andrew continued to use the property, and receive its returns, under what he claims to have been an agreement with Timothy to do so on shares. Timothy says nothing of any such agreement, never received a cent of the proceeds, and never asked for it, and heard nothing from Andrew about that, or any other matter which related to his supposed interests.

It is claimed by counsel that because complainant swore Andrew E. must be

considered as asserting his veracity. No such difficulty exists concerning Timothy, who utterly fails to throw any satisfactory light on what concerns him much more than it concerns Andrew. But it seems a little incongruous to claim that a party who puts a defendant on the stand for the express purpose of showing his fraud thereby gives him credit for honesty. This same claim was set up in *Roberts v. Miles*, 12 Mich. 297, where it was held by this court that, whatever risks may be run in doing so, the testimony is to be judged according to its merits, and creates no estoppel.

We have no disposition to go into conjectures concerning the real character or origin of some of the very suspicious documents before us; but a review of the whole record convinces us that this transaction was not only meant to avoid payment of a claim which had no defense, but that there was no genuine sale at all. All of the circumstances indicate that it was a sham throughout, and that Timothy's name is used to hold what has never been anything but Andrew's property. The testimony is evasive, and too vague to explain what needed explanation, and what both parties—Timothy as well as Andrew

—must have been able to explain. While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than in any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong. And where this occurs repeatedly, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences.

We think that the conveyance to Timothy should be declared void as against complainant's levy and judgment, and that all the proceeds, so far as they can be reached, and all the dealings connected with the land, must be regarded as belonging to Andrew. The complainant is entitled to a receiver, if he chooses to have one, and to have the usual assignment to him under the practice in judgment creditors' bills, and to pursue the usual remedies in such cases. He is entitled to a reversal of the decree below, with costs of both courts, and to enter a decree in accordance with these views. The other justices concurred.

GAMBS et al. v. SUTHERLAND'S ESTATE.

(59 N. W. 652, 101 Mich. 355.)

Supreme Court of Michigan. July 5, 1894.

Case made from circuit court, Benzie county; Fred H. Aldrich, Judge.

Action by Joseph Gambs and Charles Daniels against the estate of Charles H. Sutherland, deceased. From a judgment for plaintiffs, defendant appeals. Affirmed.

Manly C. Dodge, for appellant. D. G. F. Warner, for appellees.

MONTGOMERY, J. This is a claim filed against the estate of Charles H. Sutherland for beer claimed to have been furnished to Sutherland in his lifetime. It appears from the case made that, for several years prior to the year 1888, Charles H. Sutherland had carried on a saloon business in the village of Frankfort, in his own name; that for some time prior to June, 1888, his brother, George Sutherland, had been employed by him in the business; that in that month Charles and George, in order to enable Charles to furnish the liquor bond required by law, made an arrangement by which the saloon business should be carried on in the year 1888 in the name of George Sutherland. To carry out this arrangement, Charles executed and conveyed to George a bill of sale of the saloon outfit, excepting the liquors. An inventory was taken, the tax was paid by George Sutherland, and a bond in the sum of \$3,000 was given and approved, George Sutherland appearing as principal, and Charles as surety. George continued to work in the saloon, as bartender, for \$2 a day and his house rent. The business continued to belong to Charles, and he furnished all the capital, and received all the profits of the business. Charles kept the books of account, wrote all the letters relating to the business, looked after the business generally, but everything was done in the name of George. George did nothing in the business, except waiting on customers. The plaintiffs sold beer, which was shipped to "Sutherland," and knew of the fact that the business was being conducted in George's name, and also that the business was in fact

that of Charles Sutherland. Under the circumstances, it cannot be doubted that Charles Sutherland, who was the actual owner of the business, and who had the property and the proceeds of it, is in law liable to pay for the goods, unless the claimants have been connected with an illegal transaction, in such a way as to preclude recovery by them, on grounds of public policy. Does the evasion of some of the terms of the liquor law (see sections 1, 4, and 8 of the act, 3 How. Ann. St. p. 3181 et seq.) constitute an offense, under the facts found in the present case? We think not. The date when the plaintiffs or their agent learned that the business was being conducted in the name of George Sutherland, while it was in fact that of Charles Sutherland, is not definitely fixed, nor is there any affirmative finding that the plaintiffs did any act with the purpose of aiding in the evasion of the law. The case comes within the ruling in *Webber v. Donnelly*, 33 Mich. 469, where it was held that mere knowledge on the part of the vendor that the vendee of the goods is engaged in illegal business will not prevent a recovery of the value of the property, if there be no act done by the vendor in furtherance of the attempted illegal transaction. It may perhaps be admitted that there are circumstances in the present case from which an inference might be drawn that the claimants were guilty of some participation in the attempt to defeat the statute, but we cannot draw inferences of fact from the testimony, for the purpose of establishing error. The proper practice would have been to have had the findings cover the point, or, if the circuit judge refused to find in accordance with the testimony, to have excepted to such refusal, and thus have raised the question as to whether the evidence called for a finding of facts in accordance with the claim of the defendant. Unless we go outside of the finding, and draw inferences from circumstances, which might or might not be justified, error does not affirmatively appear. The judgment will be affirmed, with costs.

LONG, J., did not sit. The other justices concurred.

GRAVES et al. v. JOINSON.

(30 N. E. 818, 156 Mass. 211.)

Supreme Judicial Court of Massachusetts.
Suffolk. May 6, 1892.

Exceptions from superior court, Suffolk county; Robert R. Bishop, Judge.

Action by Chester H. Graves and others against Walter B. Johnson for the price of liquors sold to defendant by plaintiffs. Judgment for plaintiffs, and defendant excepts. Exceptions sustained.

A. J. Pratt, for plaintiffs. C. C. Powers, for defendant.

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine against the laws of that state. These are all the material facts reported, but these findings we must assume were warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Mr. Pollock, that some of the English cases which have gone furthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. *Holman v. Johnson*, 1 Cowp. 341; *Poll. Cont.* (5th Ed.) 308. See, also, *McIntyre v. Parks*, 3 Mete. (Mass.) 207.

The assertion of that right, however, no doubt was in the interest of English commerce (*Pellecat v. Angell*, 2 Crompt. M. & R. 311, 313) and has not escaped criticism (*Story, Conf. Laws*, §§ 254, 257, note; 3 Kent, Comm. 265, 266; *Whart. Conf. Laws*, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws (see *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 Barn. & C. 93, 95, 98; *Harris v. Rummels*, 12 How. 79, 83, 84).

Of course it would be possible for an independent state to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbors' laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition, it is admitted

that an agreement to break the laws of a foreign country would be invalid. *Poll. Cont.* (5th Ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme. *Waymell v. Reed*, 5 Term R. 539; *Gaylord v. Soragen*, 32 Vt. 110; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Hull v. Ruggles*, 56 N. Y. 424, 429.

On the other hand, plainly it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law. He must have known the intention in fact. *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coulliard*, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. *Hayes v. Hyde Park*, 153 Mass. 514-516, 27 N. E. 522.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale that the seller merely knows that the buyer intends to resell in violation even of the domestic law. *Tracy v. Talmage*, 14 N. Y. 162; *Hodgson v. Temple*, 5 Taunt. 181. So of the law of another state. *McIntyre v. Parks*, 3 Mete. (Mass.) 207; *Sortwell v. Hughes*, 1 Curt. 244, Fed. Cas. No. 13,177; *Green v. Collins*, 3 Cliff. 494, Fed. Cas. No. 5,755; *Hill v. Spear*, 50 N. H. 253. *Dater v. Earl*, 3 Gray, 482, is a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way (*Suit v. Woodhall*, 113 Mass. 391, 395; *Finch v. Mansfield*, 97 Mass. 89, 92); and the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. *Pearce v. Brooks*, L. R. 1 Exch. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another state has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. *Webster v. Munger*, 8 Gray, 584; *Orcutt v. Nelson*, 1 Gray, 536, 541; *Hubbell v. Flint*, 13 Gray, 277, 279; *Adams v. Coulliard*, 102 Mass. 167, 172, 173. Even in *Green v. Collins* and *Hill v. Spear*, the decision in *Webster v. Munger* seems to be approved. See, also, *Langton v. Hughes*, 1 Maule & S.

593; *McKinnell v. Robinson*, 3 Mees. & W. 434, 441; *White v. Buss*, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale, on the principles explained in *Hayes v. Hyde Park*, 153 Mass. 511, 27 N. E. 522, and *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417. The overt act of selling, which otherwise would be too remote from the apprehended result,—an unlawful sale by some one else,—would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine,—its tendency to produce it,—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer

knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful whether the connection is sufficient. Compare *Com. v. Churchill*, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in *Webster v. Munger*, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice that he is paid for his act. See *Com. v. Harrington*, 3 Pick. 26.

The ground of the decision in *Webster v. Munger* is that contracts like the present are void. If the contract had been valid, it would have been enforced. *Dater v. Earl*, 3 Gray, 482. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied whether the law to be violated is that of the state of the contract or of another (see *Tracy v. Talmage*, 14 N. Y. 162, 213), at least the right to contract with a view to a breach of the laws of another state of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong shared by a large part of our own citizens. *Territt v. Bartlett*, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by *Webster v. Munger*, and we believe that it would have been decided as we decide it if the action had been brought in Maine instead of here. *Bancho v. Mansel*, 47 Me. 58.

Exceptions sustained.

GIBBS v. CONSOLIDATED GAS CO. OF BALTIMORE.

(9 Sup. Ct. 553, 130 U. S. 396.)

Supreme Court of the United States. April 15, 1889.

In Error to the Circuit Court of the United States for the District of Maryland.

Plaintiff in error brought this action in the circuit court of the United States for the district of Maryland against the defendant in error, "a corporation duly incorporated under the laws of Maryland, for money payable by the defendant to the plaintiff," as stated in the "bill of particulars of plaintiff's claim," "for services rendered by me at your request in negotiating and consummating an arrangement and settlement of differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas-Light Co. of Balto. City, between July 1, 1884, and November 1, 1884, \$50,000;" and a trial was had upon the general issue pleaded, resulting in verdict and judgment for the defendant, May 14, 1885. From the bill of exceptions it appears that—

"At the trial of this case, the incorporation of the defendant being admitted, the plaintiff, to maintain the issues upon his part joined, gave in evidence the agreement following between said defendant and the Equitable Gas-Light Company of Baltimore City, a Maryland corporation,—that is to say:

"*Agreement.* This agreement, made this seventh day of October, eighteen hundred and eighty-four, between the Equitable Gas-Light Company of Baltimore City, a corporation duly organized under the laws of the state of Maryland, party of the first part, and the Consolidated Gas Company of Baltimore City, a corporation duly organized under the laws of the same state, party of the second part. Whereas, the parties hereto conduct the business of making and selling gas in the city of Baltimore, Maryland, and for some time past have been drawn into active competition, resulting in a loss of profits to each company, as well as large expenses and great annoyance; and whereas, each party hereto desires to enter into an arrangement with the other, whereby the business of each may be conducted in a more profitable manner than at present: Now, therefore, in consideration of the premises, and of the mutuality hereof, it is hereby agreed between said parties as follows, viz.:

"1. Gas shall be sold by each company at a rate of one dollar and seventy-five cents per thousand cubic feet, with a rebate of fifteen cents a thousand feet to consumers for payment within seven days from date of rendering bill, unless the rate shall be changed by mutual agreement of the parties hereto in writing; but, in view of the much larger interest of the party of the second part in the subject-matter of this contract, it is agreed that in case of competition on the part of any other gas company the said party of the second part shall have the right at its discretion

to reduce the rate at which gas shall be sold by either or both of the parties hereto, and shall have the right at its discretion to fix and change said price at which gas shall be sold by either or both of the parties hereto, from time to time, so long as such competition shall continue; provided, that said price shall not be placed at less than one dollar (\$1.00) per thousand feet without the mutual consent of the parties hereto in writing. The introduction of gas from the street main to the inside of the building to be lighted will in all cases be done by the companies, for which the proprietor of the building or the person applying for the supply of gas will be required to pay in advance the sum of eight dollars, (\$8.00,) to cover the expenses of tapping main, laying service pipe, setting meter, and its connection to the building line. An extra charge will be made where the building is set back from the building line.

"2. Each party hereto shall deduct from its receipts and retain the sum of one dollar for every thousand feet of gas sold by it as a basis of cost to cover all expenses of the business of each.

"3. All extensions of mains, including services and meters on said extensions, and all enlargement of the capacity of the works necessary to do the increasing business during the continuance of this agreement, shall be made by the Consolidated Gas Company of Baltimore City, at its own cost and expense, whose property such enlargements and extensions shall be, the Equitable Company only being required to provide the meters and services necessary to supply such additional consumers as may be furnished by it under section 5, below.

"4. Division of receipts shall be made as follows, viz.:

"(1) All receipts (over and above the sum of one dollar per thousand feet, allowed as a basis of cost) from gas sold each year upon sales not exceeding the total quantity of gas sold by both of said companies during the year ending October first, eighteen hundred and eighty-four, shall be divided between the parties hereto in the following proportions, viz.: The party of the first part shall receive such a proportion of the same as the amount of gas sold by it during the year ending October first, eighteen hundred and eighty-four, shall bear to the total quantity of gas sold by both of the parties hereto during that period, provided the quantity sold by the party hereto of the first part during said period shall not exceed two hundred and thirteen millions of feet, (213,000,000,) and the party of the second part shall receive all the balance, after deducting the amount to which the party of the first part shall be entitled, as above provided, it being expressly understood and agreed that the basis of participation in said receipts shall be the proportion which the quantity of gas sold by each party from October first, eighteen hundred and eighty-three, to October

first, eighteen hundred and eighty-four, bears to the total quantity of gas sold by both parties hereto, and that neither party hereto shall receive more thereof than by such a basis of division it would be entitled to, subject, however, to the foregoing provision that the quantity sold by the party of the first part during the said year ending October first, eighteen hundred and eighty-four, shall not be considered as exceeding two hundred and thirteen millions (213,000,000) of feet as aforesaid.

"(2) All receipts (over and above the said allowance of one dollar per thousand feet as a basis of costs) from gas sold each year upon sales in excess of the said total quantity sold during the year ending October first, eighteen hundred and eighty-four, shall be divided as follows, viz.: The party of the first part shall receive thereout a percentage equal to one-half of the percentage which it will receive as above, and the party of the second part shall receive all the balance of such receipts from said increased sales.

"5. Neither party hereto shall solicit any business belonging to the other, but either party may take such consumers of the other as may voluntarily, without any solicitation, desire to change from one to the other.

"6. All the accounts between the parties hereto hereunder shall be adjusted quarterly on the tenth days of February, May, August, and November of each year for the quarter ending on the last day of December, March, June, and September, and settlements of all balances shall be made within ten days thereafter. The said adjustment of accounts shall be made by an auditor, who shall be chosen by the agreement of both parties hereto.

"7. If any differences or misunderstandings arise hereunder, the matter in dispute shall be referred for decision to three arbiters, whose decision shall be binding upon the parties hereto, so far as in law it may have binding force and effect. Said arbiters shall be chosen as follows, viz.: One shall be chosen by each party hereto, and the third by the two so chosen: provided, that, if either party hereto neglects or refuses for ten days after request, in writing, mailed or personally delivered, to appoint an arbiter, the party making such request shall appoint two arbiters, who shall appoint a third, as above provided.

"8. It is further understood and agreed that if either party hereto shall at any time willfully fail, omit, or neglect to perform, or shall violate any of the covenants herein contained, such party shall be liable to the other for all loss and damage caused to or suffered by it thereby, and that the damages which shall be caused thereby will be equal to the sum of two hundred and fifty thousand dollars, (\$250,000,) and that the party who shall so fail, neglect, or omit to perform, or who shall violate any of the covenants herein contained, shall at once thereupon pay to the other party the sum of two hun-

dred and fifty thousand dollars as liquidated damages, and that upon failure to pay the same upon demand suit may be brought therefor, in which the damages so caused or suffered shall be assessed at said sum of two hundred and fifty thousand dollars.

"9. This agreement shall take effect from October fifteenth, eighteen hundred and eighty-four, and shall continue in force for thirty years from its date."

"[Duly signed and sealed October 7th, 1884.]

"The plaintiff then proved the incorporation of the United Gas Improvement Company, a corporation incorporated by and doing business in the state of Pennsylvania. The plaintiff further proved that at the time of the agreement aforesaid he was the general manager of the said United Gas Improvement Company, and the business of the said corporation was the owning, improving, leasing, and manipulation of gas property throughout the country; said company being the owner of many gas-works in various parts of the Union, and constantly in negotiation for the sale and purchase of that kind of property. He further proved that, by reason of the rivalry in the city of Baltimore between the defendant and the Equitable Gas-Light Company aforesaid, the price of gas had been reduced to a figure below that at which it could be profitably manufactured, and that the company of which the plaintiff was manager, as well as other gas companies throughout the country, had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore. It became, therefore, the interest of the plaintiff and his company that the conflict in Baltimore should, if possible, be brought to an amicable termination, and the plaintiff made a suggestion to that effect to the president of the Equitable Gas-Light Company, and in consequence thereof was employed by that company to bring about a settlement, if possible, with the defendant. For this purpose the plaintiff visited Baltimore, and opened negotiations with the defendant, which were carried on for some time by proposition and counter-proposition, and resulted, finally, in the agreement heretofore inserted in this bill of exceptions.

"The plaintiff gave further evidence tending to show that early in those negotiations he informed the defendant, through the committee representing it, that he was employed and would be paid by the Equitable Gas-Light Company if he made an arrangement satisfactory to that company, and that if he should be successful in bringing about a settlement satisfactory to the defendant also, he should expect and claim to be compensated by the defendant likewise. Further testimony in respect to the matter of his said negotiations and services and his claimed and expected compensation from the defendant was given by the plaintiff tending to

support and establish the hypotheses of fact set up by the plaintiff in those regards in his prayers, hereinafter to be inserted.

"The defendant then, to maintain the issues upon its part joined, gave in evidence the acts of the general assembly of Maryland of 1867, c. 132, and of 1882, c. 337, both relating to the Equitable Gas-Light Company of Baltimore City, which it was agreed might be read in evidence, if necessary, from the statute-book, on the hearing in error. The defendant further gave evidence tending to contradict the evidence on the part of the plaintiff in regard to what occurred between the plaintiff and the defendant's committee in respect to the negotiations aforementioned, and to the plaintiff's alleged demand for compensation from the defendant, and tending to disprove the facts assumed as the hypotheses of the plaintiff's prayers: and the defendant further gave evidence tending to establish and maintain the hypotheses of fact set up by the defendant in its prayers to the court, hereinafter to be inserted."

Various instructions were asked on behalf of each of the parties, which the court declined to give, but at defendant's request instructed the jury "that the plaintiff, upon the pleadings and evidence in this case, is not entitled to recover, because the contract offered in evidence, and for the procuring of the making whereof he claims compensation in this suit, was illegal and void."

S. T. Wallis, for plaintiff in error. *R. D. Morrison* and *N. P. Bond*, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

The plaintiff sought to recover compensation for services alleged to have been rendered by him to the defendant in securing the contract in question between the defendant and the Equitable Gas-Light Company of Baltimore. It is objected that the court erred in giving the instruction that the plaintiff was not entitled to recover, because it assumed a material fact in dispute, which should have been left to the jury, namely, that it was "for the procuring of the making" of the contract offered in evidence that compensation was claimed. The record does not show that this objection to the instruction was taken in the court below, nor does it contain any evidence tending to establish that the plaintiff claimed compensation for anything else than for services in bringing about the agreement. Plaintiff's bill of particulars is for services "in negotiating and consummating an arrangement and settlement of differences" between the two gas companies; and he put the contract in evidence, and adduced proof that he carried on negotiations, which "resulted finally" in the execution of it. He was general manager of a corporation engaged in the business of "the owning, improving, leasing, and manipulation of gas

property throughout the country," and, as his company and other gas companies "had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insulicent price at which it was furnished in Baltimore," he suggested "that the conflict in Baltimore should, if possible, be brought to an amicable termination," "and in consequence thereof" was employed by the Equitable Gas-Light Company "to bring about a settlement, if possible, with the defendant." The conflict referred to seems to have been the competition in the making and vending of gas in the city of Baltimore, which it had been the object of the general assembly of Maryland to encourage; and the settlement to which he alludes was embodied in the contract in question, by which competition was to be destroyed, and the object of the general assembly defeated. We do not feel called upon, under such circumstances, to reverse the judgment upon the ground that the court assumed in the instruction a matter of fact which should have been left to the jury to determine. According to the evidence given by the plaintiff, he informed the defendant "that he was employed and would be paid by the Equitable Gas-Light Company, if he made an arrangement satisfactory to that company, and that, if he should be successful in bringing about a settlement satisfactory to the defendant also, he should expect and claim to be compensated by the defendant likewise." Since he had thus entered upon the enterprise under a specific agreement with the Equitable Gas-Light Company, it is somewhat difficult to understand upon this record how, in carrying such an express contract out, he could impose the obligation on the defendant to pay him for doing so upon a mere notification that he should expect from it compensation for the services he had expressly agreed to render the other company, because the result might be satisfactory to the defendant, — a result necessarily to be assumed if any contract was arrived at. The defendant could not, in that view, be held to have laid by and accepted services which the plaintiff would otherwise not have been obliged to perform, nor could plaintiff assert that he did perform only upon the expectation of being also paid by the defendant. The hypotheses of fact set up by the plaintiff in the instructions he asked, and which were refused, contain nothing in respect of which testimony tending to support and establish such hypotheses would add to the mere fact of the notification of plaintiff's expectation, and the evidence on defendant's part tended to show a denial of any obligation to pay.

But, apart from this, the real question submitted to us for decision is whether, even if there were no other objection to plaintiff's recovery, such recovery could be allowed in view of the nature of the alleged services. In *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. Rep. 160, it was held that where a

contract, void on account of the illegal intent of the principal parties to it, had been negotiated by a person ignorant of such intent, and innocent of any violation of law, the latter might have a meritorious ground for the recovery of compensation for services and advances, but when such agent "is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." It is clear from the evidence adduced by the plaintiff that he falls within the category last described; and he makes profit of the fact that the first suggestion in the line of manipulating the gas interests of Baltimore came from himself. Hence, if the contract he brought about was forbidden by statute, or by public policy, it is evident that he could not recover, and the judgment must be affirmed. By this contract it is recited that active competition between the two companies had resulted in expense, annoyance, and loss of profits, and it was therefore provided that the price of gas to consumers should be placed at \$1.75 per thousand cubic feet, with a rebate of fifteen cents a thousand feet for payment within seven days, "unless the rate shall be changed by mutual agreement of the parties hereto in writing;" but, as the defendant had much the larger interest, it might, in case of competition on the part of any other gas company, reduce the rate at which gas should be sold "by either or both of the parties hereto, from time to time, so long as such competition shall continue," provided it should not be put at less than one dollar per thousand feet without the written consent of both parties; that the entire net receipts from the sale of gas should be pooled and divided between the companies in a fixed ratio, without regard to the amount of gas actually supplied by either; that one of the companies should lay no more pipes or mains for the supply of gas in the city; that all future pipes or mains should be laid by, and remain the property of, the other company; and that either party which violated any of the covenants in the contract should pay to the other the sum of \$250,000 as liquidated damages. It will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed, except that, in case of competition, the rate might be lowered by one, but not below a certain specified rate, without the consent of the other. And in the case in hand the Equitable Gas-Light Company was expressly forbidden to enter into such a contract. That company was incorporated by an act of the general assembly of Maryland, passed March 6, 1867, with a capital of \$2,000,000, which might be increased to \$3,000,000, and with authority to lay pipes along and under the

streets, squares, lanes, and alleys of the city of Baltimore, and to supply with light any dwelling-house or other buildings or places whatever belonging to individuals or corporations, adjacent to any such street, square, lane, or alley, and with "all the rights and privileges granted to the Gas-Light Company of Baltimore by the second, third, fourth, and fifth sections of the ordinance of the mayor and city council of Baltimore, entitled 'An ordinance to provide for more effectually lighting the streets, squares, lanes, and alleys of the city of Baltimore,' approved June 17, 1816, and the act of assembly of December session, 1816, c. 251, so far as the same are not inconsistent with the provisions of this act; and the said company hereby incorporated shall be liable to all the duties, restrictions, and penalties [provided] for in said sections of said ordinance and in said act of assembly." Laws Md. 1867, pp. 207, 211, 212. Reference to the act and ordinance of 1816 (Laws Md. 1813-1817, c. 251, of 1816; Ordinances, Baltimore, 1813-1822, p. 95) does not contribute to the argument here save as indicating the design of the general assembly to give equal powers to a competing company. Said act of March 6, 1867, § 14, further provided that "the general assembly hereby reserves the right to alter, amend, or repeal this act at pleasure." Laws Md. 1867, pp. 207, 214. On the 3d of May, 1882, an act supplementary to the act incorporating the Equitable Gas-Light Company of Baltimore City was approved, (Laws Md. 1882, pp. 550, 551,) authorizing and empowering said company to manufacture and sell gas in Baltimore county as well as in Baltimore city, and to exercise all the powers and rights conferred upon it by the acts of assembly and any amendments thereto, including the right to lay all necessary and convenient pipes, etc., in the county as well as in the city, and the fourth section of this act was as follows: "That the said company be, and hereby is, prohibited from entering into any consolidation, combination, or contract with any other gas company whatever; and any attempt to do so, or to make such combinations or contracts as herein prohibited, shall be utterly null and void."

In *Greenwood v. Freight Co.*, 105 U. S. 13, the right to repeal the charter of a street-railroad company was sustained under a provision of the General Statutes of Massachusetts declaring "every act of incorporation passed after the 11th day of March in the year 1831 shall be subject to amendment, alteration, or repeal at the pleasure of the legislature." In *Close v. Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. Rep. 267, it was said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Similar views were expressed in *Water-Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. Rep. 48; *County of Callaway v. Foster*, 93 U. S. 567; and other cases.

The consent of the corporation was not required to the operation of such a provision as that embodied in the fourth section of the act of 1882, but, if acceptance were necessary, the exercise of corporate action by this gas company after the passage of the amendment was sufficient evidence of such acceptance. The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *Gas-Light Co. v. Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *Gas Co. v. Gas-Light Co.*, 115 U. S. 683, 6 Sup. Ct. Rep. 265; *Shepard v. Gas-Light Co.*, 6 Wis. 539; *Coke Co. v. Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; *St. Louis v. Gas-Light Co.*, 70 Mo. 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, (*Printing Co. v. Sampson*, L. R. 19 Eq. 462.) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *Transportation Co. v. Pipe Line Co.*, 22 W. Va. 600; *Coke Co. v. Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; *Telegraph Co. v. Telegraph Co.*, 65 Ga. 160.

The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. pt. 2, p. 598, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and, if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. "Cases must be judged according to their circumstances," remarked Mr. Justice BRADLEY in *Navigation Co. v. Winsor*, 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived

of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld. The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong,—are void." *Bish. Cont.* § 549; *Iron Co. v. Extension Co.*, 9 Sup. Ct. 402, (decided at this term, by Mr. Justice FIELD); *Trist v. Child*, 21 Wall. 441; *Irwin v. William*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Arnot v. Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Woodruff v. Berry*, 40 Ark. 261; *Railroad Co. v. Railroad Co.*, 3 Rob. (N. Y.) 411; *Craft v. McCoughly*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Railroad Co. v. Collins*, 40 Ga. 582; *Coal Co. v. Coal Co.*, 68 Pa. St. 173. It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests. "Where," says Mr. Justice MILLER, delivering the opinion of the court in *Thomas v. Railroad Co.*, 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the state to transfer to

others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law, corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with their property, and wind up their business; but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they sim-

ply desired to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity, generally, of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas-Light Company from entering into it. That prohibition declared the policy of the state, as well as restrained the particular corporation. The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as "there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal," (Bank v. Owens, 2 Pet. 527, 539,) it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced. The question is not one involving want of authority to contract on account of irregularity of organization, or lack of an affirmative grant of power in the charter of a corporation, but a question of the absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared "utterly null and void." "The rule of law," said PARKER, C. J., in Russell v. DeGrand, 15 Mass. 35, 39, "is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain." We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed.

NATIONAL DISTILLING CO. v. CREAM CITY IMPORTING CO.

(56 N. W. 864, 86 Wis. 352.)

Supreme Court of Wisconsin. Nov. 7, 1893.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by the National Distilling Company against the Cream City Importing Company for goods sold and delivered. From an order denying a motion to strike out the first defense in the answer, and for failure to make an order on a motion to make the second defense more definite and certain, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

The complaint in this action is for a balance of \$1,148.72, due for goods, wares, and merchandise, to wit, alcohol, spirits, whisky, etc., sold and delivered to the defendant at its special instance and request. The answer is to the effect that the plaintiff, prior to the sale and delivery of the goods, entered into an agreement with divers firms and corporations residing in different states for the purpose of forming a trust or conspiracy, whereby they agreed, combined, confederated, and associated themselves together for that purpose, and wrongfully to interfere with the freedom of trade and commerce, so that it might acquire the full, absolute, and complete control and monopoly of all alcohol, spirits, and liquors manufactured in the United States, and the exclusive right to regulate, dictate, and control the amount manufactured, and the price thereof, and to render it impossible for dealers or consumers to purchase any such goods, etc., except from or through such trust, combination, etc.; that it was impossible for it to buy such goods through agents or members of said trust at their real market price by reason of such combination, but it was compelled to pay a greater price therefor, and for the purpose of recovering back such overpayments on its purchases it was obliged to enter into an agreement to purchase all such goods used in its said business for the period of six months succeeding the date of purchases from said trust or members thereof, and by so doing it would then receive the amount of such overcharges; that its business has been greatly injured by reason of said trust, etc., and by its business methods. And it was alleged on information and belief that said trust, confederation, or association, or the members thereof, were the real parties in interest in this action, and that the plaintiff is only an agent, member, or one of many partners residing in many and different states, and that the action should be dismissed, unless brought in the names of all such real parties. And as a separate defense, that between the 22d of June and 22d of October, 1892, the defendant purchased goods, wares, and merchandise to

the amount as per bills rendered of more than \$3,500; that they were billed and charged to this defendant at a greater price than the market value, and with each bill an agreement in writing was given to it, a copy of which is made an exhibit, for rebate of charges as before stated; that the spirits, alcohol, whisky, brandies, liquors, and compounded liquors purchased as aforesaid were of an inferior quality, and were not of the proof marked upon the bills furnished with the same, and upon which proofs the price therefor is fixed; that all of said goods were of less value than charged, and less than the market price, and that many of the goods were almost wholly worthless, whereby defendant was damaged, and his customs quit trading with him for that reason; that defendant had paid on said purchases a sum exceeding \$2,400, and that the value of said goods, etc., purchased by the defendant was not greater than that sum. The plaintiff moved that the first defense of illegality should be stricken out as irrelevant and redundant, and that the second defense set up should be made more definite and certain by showing the date and amount of each item of goods which the defendant claims was defective, and by showing of what the defect consists, whether in quantity or quality, and the amount of damage claimed for each defective item or article. The court denied the motion to strike out the specified portions of the answer, with \$10 costs, but did not make any order in respect to that part of the motion to make the second defense more definite and certain, and the plaintiff appealed.

George E. Sutherland, for appellant. C. W. Briggs, for respondent.

PINNEY, J., (after stating the facts.) 1. Taking the allegations of the first defense in their most liberal sense, it is apparent that they are irrelevant, and have no legal relation to the controversy between the parties to the action, which is whether the plaintiff shall recover the demand set forth in its complaint. It is obvious that they state no defense to the action; and it does not appear that any of the matters so set up can be material in any aspect of the case as now presented, but they are of such a character that they may embarrass and prejudice the plaintiff in preparing for trial, and in maintaining its action upon the merits. An entire defense may be stricken out as irrelevant, (Rev. St. § 2684;) and where a defense is irrelevant, and of the tendency above indicated, it ought to be stricken out on motion. (Horton v. Arnold, 17 Wis. 144; School Dist. v. Kernen, 58 Wis. 246, 32 N. W. Rep. 42.) But in this instance the motion was denied, with \$10 costs of motion against the plaintiff. The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as

against public policy, because the vendor was at the time a member of an unlawful trust or combination formed to unlawfully interfere with the freedom of trade and commerce, and in restraint thereof and to accomplish the ends therein set forth. It is not claimed in the answer that the trust or combination had acquired the control and monopoly of all such goods, or that the defendant might not have purchased the goods in question of other dealers in Milwaukee or elsewhere. Conceding, for the purposes of this case, that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust" or "combination," the defendant might voluntarily purchase the goods in question of it at an agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination created with the intent and purposes set forth in the answer will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences. The defendant is not a party to any illegal contract, and the case is, therefore, not within the rule of *Wheeler v. Russell*, 17 Mass. 281, and many similar cases, to the effect that "no action will lie upon a contract made in violation of a statute or a principle of the common law;" for the right of the plaintiff to make the sale in question, or of the defendant to buy, was in no way connected with or dependent upon the alleged trust or combination, although the plaintiff was a member of it. These views are sustained and illustrated by the cases of *Brooks v. Martin*, 2 Wall. 70, and *Sharp v. Taylor*, 2 Phil. Ch. 801; and many other cases might be cited to the same effect. The provision for a rebate of a part of the purchase price to purchasers who would conduct their busi-

ness in the manner stated in the answer was an inducement to them to continue their business relations with the plaintiff. It does not appear that there was any contract obliging the defendant to that course. A party may legally purchase the trade and business of another for the purpose of preventing competition, and the restraint of trade caused thereby is not, we think, unreasonable. *Mitchell v. Reynolds*, 1 Smith, Lead. Cas. pt. 1, p. 417, and notes. And it would seem that an agreement between a number of dealers and manufacturers to raise prices, unless they practically control the entire commodity,—and this is not claimed of the trust in question,—cannot operate as a restraint upon trade, nor would it injuriously affect the public.

Both the plaintiff and defendant are Wisconsin corporations, and the goods in question were sold in this state. The sale, therefore, was not a transaction of interstate commerce, and was not within the act of congress of July 2, 1890, 26 Stat. 209.

The allegation that the trust or combination is the real party in interest in this action, and that it can only be maintained by it, and should be dismissed unless brought in its name or the names of all the members thereof, is fatally defective as a plea or defense in abatement. It does not appear whether the alleged trust or combination is a partnership or a corporation, and so a legal entity, capable of suing or being sued; nor is it averred that it or any of its members other than the plaintiff had any interest in the goods sold or the money to be paid for them. The answer in this respect deals only in conclusions of law, leaving wholly uncontroverted the allegations of the complaint that the goods in question were sold and delivered by the plaintiff to the defendant at a price agreed upon between them; nor does it deny the allegation of indebtedness therefor to the plaintiff. It fails to state any facts showing that the action is not rightly brought in the name of the plaintiff.

2. The circuit court omitted, inadvertently as we presume, to pass upon the second branch of the plaintiff's motion, namely, to make certain portions of the second defense more definite and certain. It is correct practice, we think, to combine in a single motion as many objections as the plaintiff supposes the defendant's answer is subject to, with a view of having them all determined at the same time, and not piecemeal, thus avoiding a multiplicity of motions and possible appeals. The plaintiff had an undoubted right to have its motion decided in all its material aspects, and, without indicating any opinion whether the motion as to the second defense should have been to make it more definite and certain, or for a bill of particulars thereof, we hold that it was material error for the circuit court to omit or fail to determine this branch of the motion, for, until determined, the plaintiff could not secure

the rights which the statute gives it in respect to such pleading, to either have the same made more definite and certain, or a bill of particulars under it, and it is thereby deprived of all remedy it may have in this

respect. For these reasons the order of the circuit court is erroneous, and must be reversed, and the cause remanded to the circuit court for further proceedings according to law. It is so ordered.

RICHARDS v. AMERICAN DESK & SEATING CO.

(58 N. W. 787, 87 Wis. 503.)

Supreme Court of Wisconsin. April 10, 1894.

Appeal from circuit court, Manitowoc county; N. S. Gilson, Judge.

Action by William D. Richards, assignee, etc., against American Desk & Seating Company. From an order overruling a demurrer to defendant's counterclaim, plaintiff appeals. Reversed.

The plaintiff sues as assignee of the Manitowoc Manufacturing Company, a Wisconsin corporation, which was engaged in the manufacture and sale of school, church, and opera-house furniture, and other furniture and specialties, and the defendant is an Illinois corporation, and during the times named in the pleadings was engaged in buying, selling, and manufacturing the same kinds of furniture. The action is brought for the recovery of \$10,000 for goods, wares, and merchandise of the kind above mentioned, sold and delivered by the plaintiff's assignor to the defendant. The defendant set up two counterclaims for damages, in all in the sum of \$370,000, for alleged breaches of two certain written agreements executed by the plaintiff's assignor and the defendant; one of them, dated February 8, 1889, was to terminate February 1, 1894, and the other and material one was made June 18, 1890, and was to continue in force until December 31, 1894. The question presented was whether these contracts were valid or void as against public policy, as being in restraint of trade. By the first contract it was agreed that the plaintiff's assignor should make, in such quantities and kinds as might be ordered by the defendant, and deliver the same free on board at Chicago, Ill., opera and church chairs, pews, settees, bank, church, hall, lodge, office, store, and school furniture, including store stools, measuring machines, goods and book shelves, and other specialties, all of which were "to be made for and sold to the defendant only, during the term of this contract," and the defendant agreed "to purchase \$250,000 worth of goods under this contract" of the plaintiff's assignor. By the second contract the plaintiff's assignor was to make and deliver to the defendant, free on board at Chicago, goods manufactured by it, in such quantities and kinds as might be ordered by the defendant, of substantially the same character as provided in the first contract, and the orders of the defendant were to have a preference over all other work. After making provisions with regard to patterns and other matters not material to the present question, it was stipulated that the prices to be paid by the defendant, except for the iron parts or castings, should not exceed the prices charged by any other responsible manufacturer for like goods, and prices were specified for the iron

parts. It was agreed that, if the plaintiff's assignor fulfilled the covenants on its part, the defendant should purchase of the plaintiff's assignor "during the period of this contract, and under its terms, goods or other articles to the amount of not less than \$200,000," specifying the time and manner of payment for the same, and that, "during the term of this contract, the party of the first part (plaintiff's assignor) shall not sell, either directly or indirectly, any of the goods or articles of the several kinds hereinbefore agreed to be made for and delivered to the party of the second part, within the following described territory, west of and including the following counties in Wisconsin: Ashland, Price, Taylor, Clark, Jackson, Monroe, Vernon, and Richland, and south of and including the following counties: Iowa, Dane, Jefferson, Waukesha, and Milwaukee; in Michigan, all the territory south of and including the following counties: Muskegon, Kent, Montcalm, Gratiot, Saginaw, Tuscola, and Huron; and all of the following named states and territories: Illinois, Indiana, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Indian Territory, Texas, New Mexico, Colorado, Wyoming, Montana, Washington, Idaho, Oregon, Nevada, Utah, California, Arizona, and Mexico. Nor shall the party of the first part, during the term of this contract, sell any of said goods or articles to any person, firm, or corporation whom it knows, or has good reason to believe, intends to resell the same within said territory." It was further agreed "that, during the term of this contract, the party of the second part (the defendant) shall not sell, either directly or indirectly, any of the goods or articles of the several kinds hereinbefore agreed to be made for and delivered to it (except as hereinafter expressly provided) within the following described territory: In Wisconsin, all of the territory east of the following counties: Ashland, Price, Taylor, Clark, Jackson, Monroe, Vernon, and Richland, and north of the following counties: Iowa, Dane, Jefferson, Waukesha, and Milwaukee; in Michigan, all of the territory north of the following counties: Muskegon, Kent, Montcalm, Gratiot, Saginaw, Tuscola, and Huron; and all of the following states and territories: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Virginia, North Carolina, Tennessee, Kentucky, and Ohio. Nor shall the party of the second part, during the term of this contract, sell any of said goods or articles to any person, firm, or corporation whom it knows, or has good reason to believe, intends to resell the same within said last-described territory; provided, however, and it is expressly agreed, that the party of the second part, or its agents, may sell in any part of the United

States the desk known as the 'Yale desk,' school apparatus and settees, and bank, office, and store furniture, and that any sale of said Yale desk, or any school apparatus or settees, or any bank, office, or store furniture, in any state or territory by the party of the second part, or any of its agents, shall not be deemed a violation of this contract or any of its provisions. * * * A sum equal to twenty-five per cent. of the amount of any sale made by either of the parties in violation of the provisions of the contract, as liquidated damages, and not as a penalty, shall be paid by the party making any such sale, to the other party, but the delivery by either of the parties within the territory of the other, under and in performance of any existing contract, shall not be construed as a violation of this contract." It was further agreed that each of the parties should transfer to the other any agency or agencies it might then have, and the good will of any business it may have established, within the territory of the other as thus defined; the plaintiff's assignor was to pay to the defendant a commission of 5 per cent. on the amount received for any goods or articles which might be thereafter delivered by it to any person, firm, or corporation within the territory of the party of the second part, under any then existing contracts; and, further, that the first-named contract should not be in force thereafter, but that this contract or any of its provisions should not be construed as waiving or releasing, or in any way impairing, any claim or right of action either party may have against the other under and by reason of said contract of February 8, 1889, or otherwise."

The first counterclaim is for damages for neglecting and refusing to manufacture \$100,000 worth of goods ordered under the last-named contract, in the amount of \$25,000, and for a claim for mistakes in filling orders, for not replacing castings that were imperfect and broken, and unreasonably delaying the shipment of goods ordered, the sum of \$5,000; and in the sum of \$3,000 for patterns not paid for or returned, furnished by the defendant under the second contract; 25 per cent. liquidated damages on damages sustained by the sale of nearly all the different kinds of manufactured goods specified in the contract in the defendant's district during the years 1890, 1891, 1892, in the state of Illinois, on sales amounting to \$40,000; in Indiana, \$10,000; South Carolina, \$5,000; Georgia, \$10,000; Florida, \$10,000; Alabama, \$5,000; Mississippi, \$5,000; Louisiana, \$7,000; the state of Wisconsin, \$10,000; Missouri, \$15,000; Iowa, \$10,000; Minnesota, \$15,000; North Dakota, \$5,000; South Dakota, \$5,000; Nebraska, \$10,000; Kansas, \$15,000; Indian Territory, \$1,000; Texas, \$15,000; New Mexico, \$4,000; Colorado, \$10,000; Wyoming, \$5,000; Montana, \$8,000; Washington, \$15,000; Idaho, \$5,000; Oregon, \$10,000; Nevada, \$5,000; Utah, \$7,000; California,

\$25,000; Arizona, \$3,000; Mexico, \$5,000; in territory in Wisconsin, in which it agreed not to sell, \$20,000; in like forbidden districts in the state of Michigan, \$50,000; in all, amounting to \$365,000, upon which damages were claimed in the sum of \$91,250. The second counterclaim was for the sum of \$5,000, founded upon a provision of the second contract above, to the effect that the plaintiff's assignor should pay to the defendant a commission of 5 per cent. on the amount the plaintiff's assignor received for any goods or articles which it might thereafter deliver to any person, firm, or corporation within the defendant's territory under any then existing contracts, and which, in effect, was a part consideration for the defendant's stipulations; and it was alleged that the defendant had sold and delivered, for the plaintiff's assignor, such goods, wares, etc., to the amount of \$100,000, and that it was entitled by the terms of said contract to a commission of 5 per cent., amounting to \$5,000. The plaintiff demurred separately to each of these counterclaims, on the ground that it did not state facts sufficient to constitute a defense, nor sufficient to constitute a counterclaim. The circuit court made an order overruling the demurrers, from which the plaintiff appealed.

Nash & Nash, for appellant. Markham & Markham, for respondent.

PINNEY, J. (after stating the facts). The agreement in question is in partial or limited restraint of the trade of both of the parties to it in certain lines of articles which were to be manufactured and sold by the plaintiff's assignor to the defendant, up to the amount of \$200,000, and during a period of less than four years. By the terms of the agreement the plaintiff's assignor was prevented from selling, directly or indirectly, any other like articles of its manufacture during that time in a large part of Wisconsin and of Michigan, and in any part of 30 other states and territories of the United States, and a like restraint was imposed on the defendant as to the remainder of Wisconsin and Michigan, and all the other states of the Union. Both counterclaims are founded upon, and grow out of, the alleged breaches by the plaintiff's assignor of provisions of this contract, and are dependent upon its validity, but the more important one relates to a claim to recover 25 per cent. of the amount of sales alleged to have been made by the plaintiff's assignor within said period in the territory set apart exclusively to the defendant for making sales of such articles. It will be seen from the statement of the case that the restraint against the plaintiff's assignor, alleged to have been violated, was total in all the states and territories named in it, except Wisconsin and Michigan, where it extended to parts only of those states, but it was limited in respect to the time it was

to continue. That any agreement in restraint of trade of one of the parties to a contract is void, as being against public policy, unless founded upon a valuable consideration, and limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case, is well settled, for the reason that such contracts tend to deprive the public of the services of parties in the employments and capacities in which they are most useful, and that they tend to expose the public to the evils of monopoly. *Kellogg v. Larkin*, 3 Pin. 123; *Laubenheimer v. Mann*, 17 Wis. 561; *Alger v. Thacher*, 19 Pick. 51; *Bishop v. Palmer*, 116 Mass. 469, 473, 16 N. E. 299; *Navigation Co. v. Winsor*, 20 Wall. 66, 67; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; *Lange v. Werke*, 2 Ohio St. 519; *Telegraph Co. v. Crane* (Mass.) 35 N. E. 98. These cases show, and many others might be cited to the same effect, that it is essential, in order not to be unreasonable, that the restraint imposed must not be larger than is plainly required for the protection of the party with whom the contract is made, and whether it is reasonable in a given case is a question, not of fact, but of law for the court. *Pol. Cont.* 366-368; *Washburn v. Bosch*, 68 Wis. 440, 3^d N. W. 551. The test as to whether the restraint is reasonable or not is well expressed in the often-cited case of *Horner v. Graves*, 7 Bing. 735, 743, where it is said: "The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable." It is said, in substance, in many cases, that all restraints are presumed to be bad, but, if the circumstances are set forth, that presumption may be excluded, and the court is to judge of these circumstances whether the contract be valid or not. *Taylor v. Blanchard*, 13 Allen, 373; *Callahan v. Donnelly*, 13 Am. Rep. 172, and note; *Mallan v. May*, 11 Mees. & W. 853; *Lange v. Werke*, 2 Ohio St. 519; *Kellogg v. Larkin*, 3 Pin. 123; *Machine Works v. Perry*, 71 Wis. 495, 499, 501, 38 N. W. 82. It is held, in substance, in these cases, that the pleading will be bad on demurrer if it does not appear from the contract or averments of extrinsic facts that the restraint was reasonable. This is in accordance with the great weight of authority, and seems to be the necessary result of the rule as to the validity of such restraint. The great diffusion of wealth, the wonderful advances made in the methods and facilities for manufacturing and carrying on commerce, the manifold improvements in machinery, and in the adaptation of steam and electricity as motive powers, have enlarged or opened numerous fields

of industry, and wrought marvelous changes, and the tendency of the later cases has been in relaxation of the earlier rule in relation to contracts in restraint of trade. The most liberal and advanced doctrine on the subject in this country is found in the case of *Match Co. v. Roebor*, 106 N. Y. 473, 13 N. E. 419, in which the history of the law is elaborately considered, and a covenant excluding a manufacturer of matches, who had sold his property, stock, etc., from engaging in the manufacture and sale of matches for a period of 99 years within any of the states and territories, except Nevada and Montana, was sustained; but it appeared in that case that before such sale he had carried on the business of manufacturing friction matches, "and of selling the same in the several states and territories of the United States, and in the District of Columbia," and so the case really came within the rule under consideration, and the restraint was reasonably necessary to protect the other party in his purchase, in view of the circumstances disclosed. *Tode v. Gross*, 127 N. Y. 485, 28 N. E. 469, was in relation to a restraint imposed upon the vendor of a business founded on a secret process, but it recognizes and sustains the general rule. A manufacturing business founded upon the use of a secret process, or the use of patented processes or means, is not understood to be within the rule. The cases of *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, and *Rousillon v. Rousillon*, 14 Ch. Div. 351, are understood to represent the more modern views of the law on this subject in England. In the former case it was said: "All restraints upon trade are bad as being in violation of public policy, unless they are actually and not unreasonably for the protection of parties in dealing legally with some subject-matter of contract." The same subject was considered in the somewhat recent case of *Davies v. Davies*, 36 Ch. Div. 359, in which Cotton, L. J., held the law to be "that a limited restraint may be good, provided the restraint is reasonable, and such as was required for the protection of parties with whom the covenant is entered into," and that the rule ought not to be altered but by the house of lords; and Bowen, L. J., held substantially the same view, and notices that in that case the court had no materials for deciding that the covenant in question was beneficial to the public, or reasonably necessary for the protection of the covenantee, and, in substance, that to sustain it would be "leaping into the dark;" while Fry, L. J., was inclined to adhere to his decision in *Rousillon v. Rousillon*, supra, and hold that the burden of proof as to the validity of the restraint is shifted by showing that it has been entered into for the protection of the interests of one of the contracting parties.

The counterclaims and second contract, made an exhibit thereto, are exceedingly

meager, and wholly insufficient to show that the agreement of restraint insisted on by the defendant was reasonably necessary for the protection of its interests under the contract. While it appears, by implication, that the respective parties may have agencies in the territory set apart to each for the sale of the line of goods and wares mentioned in the contract, there is nothing to show the amount of annual output of these goods and wares by the plaintiff's assignor, or of the ordinary amount of manufacture and sale by either party, or that the defendant had established or carried on any trade in more than one state out of the thirty states and territories to which the restraint it seeks to enforce extends, and in respect to which it charges violations of this restraint by the

plaintiff's assignor. The counterclaims wholly fail to show that the defendant's interest for less than four years in the sale and disposition of \$200,000 in value of the goods and wares mentioned, even upon the most liberal view of the subject, and under the existing state of trade and competition, would justify the very extensive restraint relied on. It follows from these views that, upon the face of the pleadings, it is not made to appear that the contract was a reasonable and valid one, and therefore the portions of the order appealed from are erroneous. The parts of the order of the circuit court appealed from are reversed, and the cause is remanded, with directions to sustain the plaintiff's said demurrers to the counterclaims.

GREGORY et al. v. WENDELL et al.

(39 Mich. 337.)

Supreme Court of Michigan. Oct. 15, 1878.

Assumpsit. Plaintiffs bring error.

Atkinson & Atkinson, for plaintiffs in error.
Otto Kirchner and Ashley Pond, for defendants in error.

MARSTON, J. Plaintiffs reside in Owosso, and in 1877 were engaged in the purchase of grain and other farm products. Defendants were commission merchants in the city of Detroit.

On the 26th of April, 1877, one of the plaintiffs had a conversation with one of the defendants in the city of Detroit about speculating in corn and wheat. It resulted in plaintiffs directing defendants to purchase for them 20,000 bushels of corn, deliverable at Chicago in June following. It was claimed that defendants thereupon telegraphed to certain commission merchants in Chicago directing the purchase, and received a few minutes thereafter a telegram announcing the purchase of the quantity mentioned and at prices therein named. It was at this time agreed that plaintiffs should send defendants \$1,000 as a margin upon this purchase, which was done within a few days thereafter. The receipt thereof was acknowledged by defendants and credited to plaintiffs' account.

Other correspondence was had between these parties in reference to this purchase and the condition of the grain markets.

On May 17th plaintiffs wrote defendants, suggesting a change from June to July corn, and on the 18th defendants wrote plaintiffs that they had sold the June corn and purchased July corn, and enclosed a statement of account showing a loss to plaintiffs. The receipt of this letter by plaintiffs was on the next day, and a hope expressed that the loss sustained on the June would be got back on the July corn. The market continued to decline. Further margins were called for, but not made. Two car loads of wheat were shipped by plaintiffs to defendants, and by them sold on commission, and the proceeds credited to plaintiffs on account.

Action was brought to recover the amount received for this wheat, and to recover back the \$1,000 margin. There was no dispute as to the wheat or its value, and judgment was recovered for the amount thereof. The court charged the jury that no part of the \$1,000 could be recovered. In this it is claimed that the court erred, and also in not submitting the question to the jury whether any corn was ever actually purchased.

Gregory, one of the plaintiffs, testified that he never saw any of the corn, and that none had ever been delivered to him.

He also testified that in July certain parties called at his office; that they had an envelope, the contents of which he declined to

examine, and there was evidence tending to show that they were there and offered to make him a tender of warehouse receipts for July corn. There was evidence tending to show that before the commencement of this action defendants were called upon in the plaintiffs' interest, and requested to produce and show the telegrams in reference to the purchase of the June corn, but that, although search was made, they were unable to find them, although such were produced on the trial. A Mr. Thomas, a broker on 'change for Cooley & McHenry of Chicago, testified that he purchased twenty thousand bushels of corn on April 26th; that he and the party from whom he purchased made the usual memorandum of the transaction, which was afterwards, in accordance with the custom, reduced to formal entries on their respective books. The original memorandum and entries were not produced, and the witness was unable to give the name of the person from whom he purchased the corn, or where it was at the time, or to whom he afterwards sold it. Other evidence was given, which it was claimed tended to show that no actual sale of corn had been made.

It seems to me that the real questions thus raised in the case were: Was there an actual, bona fide sale of corn intended by the parties, or any of them, to be delivered and received? Or did the parties intend that no corn should be purchased, delivered, or received, but that a settlement should be made upon a basis of the market price of corn at the time mentioned for delivery? Some nice distinctions have heretofore been drawn as to the right of a person to sell personal property not at the time owned by him, but which he intended to go into the market and buy; or, as was said, that which he hath neither actually nor potentially. Courts, must, however, from necessity, recognize the methods of conducting and carrying on business at the present day, and, applying well-settled principles of the common law, enforce what might be called a new class or kind of agreements, heretofore unknown, unless they violate some rule of public policy. The mercantile business of the present day could no longer be successfully carried on if merchants and dealers were unable to purchase or sell that which, as to them, had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by the delivery of warehouse receipts according to custom, is also beyond dispute.

In these cases there is something actual and tangible sold, although not then owned or possessed by the vendor, or rather something actual and tangible agreed to be sold, as the

agreement is more in the nature of a contract for a future sale. There is also an intention, and such is the agreement, that when the time agreed upon for delivery arrives the property shall be actually delivered. This, as already said, may, as in the case of grain, be by a delivery of warehouse receipts, for the quantity and quality agreed upon, rather than for any particular lot. The vendee under such an agreement may, before the time for delivery to him has arrived, agree to sell or transfer his right to the goods, or under the contract to some one else, who, should he retain the same, would be entitled to receive possession thereof at the time agreed upon by the parties through whom he claims title.

But where the parties, at the time of entering into an agreement for the purchase and sale, apparently, of goods for future delivery, agree that no title to any property shall pass, and that nothing shall be delivered,—no delivery made; or where, from the nature of the transaction and the manner and method of carrying on the business, it is apparent that such was the intention of the parties, although not expressed, but the agreement or understanding was that at the time fixed for delivery they should settle, upon a basis of the then market price of the commodity, by the losing party paying to the other the difference,—such an agreement would be one that the law would not recognize and enforce. It would not constitute a sale or an agreement to sell property of any kind, but one to speculate upon the prices that certain property would be likely to bring at some future day.

The distinction was clearly pointed out in *Rumsey v. Berry*, 65 Me. 574. The court said: "The mischief and illegality arises when the apparent contract is not the real one; when it is a mere cover for ulterior designs, and such as are not authorized by law. A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure."

This question was fully discussed by Agnew, J., who delivered the opinion of the court in *Kirkpatrick v. Bonsall*, 52 Pa. St. 155, where the court held a certain contract was not, on its face, a gambling contract, but that its character might be weighed, in connection with other evidence, on the question that the transaction was a gambling scheme. The court said a bargain for an option may be legitimate and for a proper

business object. "But it is evident such agreements can be readily prostituted to the worst kind of gambling ventures, and therefore its character may be weighed by a jury in connection with other facts in considering whether the bargain was a mere scheme to gamble upon the chance of prices. The form of the venture, when aided by evidence, may clearly indicate a purpose to wager upon a rise or fall in the price of oil at a future day, and not to deal in the article as men usually do in that business. We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed 'speculation.' Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. * * * Their speculations display talent and forecast, but they act upon their conclusions, and buy and sell in a bona fide way. Such speculation cannot be denounced. But when ventures are made upon the turn of prices alone, with no bona fide intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. The purpose then is not to deal in the article, but to stake upon the rise or fall of its price. No money or capital is invested in the purchase, but so much only is required as will cover the difference,—a margin, as it is figuratively termed. Then the bargain represents not a transfer of property, but a mere stake or wager upon its future price."

See, further, *Grizewood v. Blane*, 11 C. B. 526, where it was held that a contract to purchase shares of stock without the intention to deliver or receive them was a gaming contract.

In *Yerkes v. Salomon*, 11 Hun, 473, it was said that the authorities were abundant upon the proposition that, if neither party intended to deliver or accept shares, but merely to pay differences according to the rise or fall of the market, the contract would be a gaming one. And in that case it was held to be error to exclude a question asking what the intention at the time the contracts were made was,—whether to tender or call stock, or merely to settle upon differences.

It is clear from these authorities that the form of the contract on its face is not conclusive, but that its character should be considered by the jury in the light of all the surrounding facts and circumstances, in order for them to determine whether a mere scheme to gamble upon prices was the intention, or an actual bona fide sale of grain to be delivered at the time mentioned.

There were some suspicious facts and circumstances in this case. The weight thereof, or the proper conclusion to be arrived at from a view of the whole case, it is not for this court to determine. The whole case, under proper instructions, should have been submitted to the jury, and the court erred in withdrawing the case from them. There

must, therefore, be a new trial ordered, upon which the case may appear in one of three different aspects:

First. If the parties acted in good faith, and the agreement made contemplated an actual purchase and delivery of grain, and such a purchase was in fact made, then the amount paid by plaintiffs in error to cover any loss which defendants might suffer or become responsible for on account of a decline in the price or value of the grain purchased cannot, to the extent of such loss, be recovered back.

Second. If, under the agreement made, neither party contemplated or intended that any grain should in fact be purchased or delivered, but that at the time mentioned for delivery the difference between the contract and the market price should be paid to the person entitled to receive the same, such agreement being void as against public policy, and both parties being equally in the wrong, the law would afford no assistance

to either, and the amount paid over as a margin could not be recovered back.

Third. If plaintiffs in error, acting in entire good faith, authorized defendants to purchase grain for them, to be delivered at a future date, contemplating and intending that an actual purchase of grain and a delivery thereof to them would be made, but the defendants, without being induced by plaintiffs' action into any misunderstanding, did not in fact make or cause to be made an actual bona fide purchase of grain, but acted upon the theory that the difference in price only should be accounted for and paid, then, and under such circumstances, plaintiffs, upon discovery of such facts, would have a right to repudiate what had been done, and recover back the amount by them advanced or paid over to the defendants.

Judgment reversed, with costs, and a new trial ordered.

The other justices concurred.

MORRISSEY v. BROOMAL et al.

(56 N. W. 383, 37 Neb. 766.)

Supreme Court of Nebraska. Oct. 4, 1893.

Commissioners' decision. Appeal from district court, Lancaster county; Hall, Judge.

Action by John C. Morrissey against George Broomal and others for an injunction and other relief. Defendants had decree, and plaintiff appeals. Affirmed.

G. M. Lamberton, for appellant. Lamb, Ricketts & Wilson, for appellees.

RAGAN, C. March 1, 1889, appellant was a grain dealer in Nebraska, and appellees were commission merchants in Chicago, Ill. These parties entered into a written contract bearing said date, in words and figures as follows: "This agreement, made this first day of March, 1889, by and between Wanzer & Co., of Chicago, Ill., of the first part, and J. C. Morrissey, of Lincoln, Nebraska, of the second part, witnesseth as follows: Wanzer & Co. agree to loan to said Morrissey a sum not exceeding thirty thousand dollars, to be used in the purchase of corn and other grain, seeds, etc., in the state of Nebraska, the rate of interest on the same to be seven per cent. per annum, to be charged monthly, as said Morrissey's indebtedness may appear. Said Morrissey agrees to give his promissory notes at 30, 60, and 90 days, to be renewed from time to time, as may be necessary, for the entire sum so loaned, together with crib or warehouse receipts representing all the grain purchased with such funds, or other grain or produce of fully equal value. Said Morrissey further agrees to sell through said Wanzer & Co., for future delivery in the Chicago market, corn equal to the amount of ear corn purchased with funds furnished by Wanzer & Co., which sales may be charged from month to month, as may be directed by said Morrissey. For the purchase and sale of this grain said Morrissey agrees to pay Wanzer & Co. one-sixteenth of one cent per bushel per month on all corn on hand at the close of each and every month, which shall cover the charge of changing from month to month; and if purchases and sales of this character are made in any month in excess of the amount of corn on hand, the charge of such purchase and sale, or sale and purchase, shall also be one-sixteenth of one cent per bushel. Said Morrissey agrees to ship to Wanzer & Co. all grain, seeds, and other produce purchased by him; Wanzer & Co. to sell the same in the Chicago market in such manner as in their judgment shall best serve the interests of said Morrissey, and the commission charge for such service shall be one-half cent per bushel for corn, and for all other grain or produce one-half the rates provided for by the rules of the Chicago Board of Trade for the shipment of nonmembers of said board of trade;

provided, however, that said Morrissey shall have the privilege of selling such grain on track or of shipping it to other markets, having first obtained the written consent of said Wanzer & Co., said Morrissey to pay to Wanzer & Co. the sum of \$2.00 per ear on every ear of grain or seed or produce shipped by him or his agents during the life of this contract, and not handled by said Wanzer & Co., which \$2.00 per ear shall be in lieu of the one-half cent per bushel above provided for. Said Morrissey shall make a full statement at the close of each calendar month of the amount of the grain on hand and the amount of grain sold or shipped by him during that month other than to Wanzer & Co., and on receipt of said statement of Wanzer & Co. shall make the charges provided for in this agreement. Said Morrissey shall also furnish to said Wanzer & Co., on their request, a full and unreserved statement of his financial condition, as they may demand from time to time. Besides such sums of moneys as are above provided for, Wanzer & Co. agree to pay drafts attached to negotiable bills of lading to nearly the value of the property so represented. Said Wanzer & Co. agree to report daily all sales of property for account of said Morrissey, and to furnish him with such information as he may request concerning such sales, and to make all returns as promptly as possible. Said Morrissey further agrees to pay interest on all sums Wanzer & Co. may deposit as margins on transactions made in his behalf, and said Wanzer & Co. shall notify said Morrissey of the deposit of said margin. This contract shall be terminated on the first day of March, 1890, Wanzer & Co. reserving the right to terminate the same by giving 30 days' written notice; and on the termination of this contract, either by such notice or at the expiration of the time herein agreed, said Wanzer & Co. shall be entitled to collect from said Morrissey a sum equal to one-half the charges said Wanzer & Co. would receive on the grain said Morrissey shall then have on hand, according to the aforementioned rates in this contract. J. C. Morrissey, Wanzer & Co."

Under this contract appellees advanced appellant \$19,750, for which appellant gave his notes, secured by warehouse or crib receipts on grain stored in his elevators in Nebraska. In January, 1890, appellees held a note of appellant for \$2,000, dated March 15, 1889, due 60 days after date, on which there was due and unpaid \$1,239, and some interest, to secure the payment of which appellees held certain warehouse or crib receipts issued to them by the appellant on grain in his elevators. At this date—January, 1890—appellees sent this note and the crib receipts to a bank in Lincoln, Neb., for collection. It appears that while the bank held the note and warehouse receipts, appellant brought this action in the district court of Lancaster county to enjoin the appellees

and the bank from transferring or disposing of the warehouse receipts, and from taking possession of the grain covered by them, and to cancel said securities. Appellees filed a cross petition in this action, setting out the contract above, the giving to them by appellant of the note and crib receipts to secure the payment of the same, and that the note was unpaid, and prayed for an accounting of the amount due on it, and a foreclosure of their lien on the grain, and a sale of the same to satisfy the amount found due. Appellant then dismissed his injunction suit, and filed an answer to appellees' cross petition, which, after admitting the execution of the contract and note and crib receipts, set out the following defenses: (a) A general denial of the averments of the cross petition, do That the crib receipts sought to be foreclosed had been satisfied by grain shipped and money remitted by the appellant to appellees according to the terms of the contract, and that the grain so shipped was grain purchased with the money borrowed by the appellant of the appellees and the money remitted was proceeds derived from the sale of the grain purchased with the money borrowed of the appellees, and that appellant had no grain in his possession covered by said warehouse receipts, (c) That the appellant was financially responsible, and therefore appellees had a complete and adequate remedy at law, and that the court was without equitable jurisdiction, (d) That the contract between the parties, and the notes executed in pursuance thereof, were usurious, (e) That "the contract is illegal and void, having been made in violation of the law, and against public policy, in so far as the plaintiff agrees to make good any margins advanced by the defendants on grain bought or sold for future delivery on the board of trade, * * * the same being a gambling contract," (f) A counterclaim that appellant was induced to sign the "contract with the belief and the understanding and agreement that the same should continue in force for one year from its date, and with the understanding and agreement then had and with the understanding and agreement subsequently had with the defendants that said contract should continue in force one year from its date; * * * and the plaintiff avers that notwithstanding said clause authorizing said forfeiture of said contract at the option of the defendants on thirty days' notice, was in said contract at the date of its execution, yet it was then agreed and understood by and between the plaintiff and defendants that said clause should have no force and effect; * * * that the plaintiff continued to do business with the defendants until about the 18th of November, 1889, when the said defendants arbitrarily, unjustly, and without any good cause or reason notified the said plaintiff that said contract would be forfeited on or about the 29th day

of December, 1889; * * * and by reason of the notice of said defendants that said contract was terminated, and their refusal to carry it into effect and advance said moneys for one year, as understood and agreed between the plaintiff and defendants, and by reason of the defendants' recall of all the moneys advanced and loaned, said plaintiff was damaged in his business and credit and put to great expense in the sum of \$10,000." The prayer of this answer was that the cross petition of the appellees might be dismissed, and the appellant might have such other relief as in equity and good conscience the court might find him entitled. To this answer appellees filed their reply, denying all the allegations of new matter in the answer. There was a trial to the court, who found all the issues in favor of the appellees, but found that appellant had sold and shipped the identical grain covered by the crib receipts, and the court rendered a personal judgment against the appellant for the amount due on the note.

When the issues were complete, appellant moved the court to transfer the case to the law docket, and impanel a jury for the trial of the case. This motion the court overruled. When the trial was about to begin, appellant again moved the court for a jury trial on the issues of the facts involved in the case. This motion the court overruled. The overruling of these motions is the first complaint made by the appellant here. Whether this ruling of the court was correct depends upon the nature of the issues made by the pleadings, and the character of the relief demanded. The cross petition alleged the making and delivery by the appellant to appellees of a note and certain warehouse receipts on grain in his elevators to secure the payment of the note; that the note was past due and unpaid. Appellees' prayer was for a foreclosure of the liens on the grain, and a decree for its sale to pay the amount due on the note. The answer admitted the execution of the notes and securities, but alleged that the liens or crib receipts had been discharged; that the note was usurious; that the contract out of which the subject-matter of the claim in the cross petition grew was void, being a gambling contract; that said contract, as written, was not as agreed and understood by the parties; and there was a prayer for a reformation of it. The cross petition demanded equitable relief only. It invoked the equity powers of the court, and the issues made by the cross petition, the answer of the appellant thereto, and the reply of the appellees were entirely equitable; but appellant also alleged by way of counterclaim in his answer that he had been damaged \$10,000 by the wrongful termination of the contract by the appellees. Did this counterclaim of the appellant for damages oust the court of its equitable jurisdiction? Is a defendant to a purely equitable suit entitled as

a matter of right and law to a jury for the trial of an issue of law which he has voluntarily brought into the case? We think not. The appellant had a right, if he was so minded, to file his counterclaim for damages in this equity suit. It was an independent cause of action existing in his favor and against appellees, but appellant's cause of action on his counterclaim, was not lost to him or barred had he left it out of this suit. The action as made by the appellees in their cross petition was one purely of equitable cognizance; but part of the relief demanded by the appellant could only be granted by a court of equity. The familiar principle is that when a court of equity acquires jurisdiction over a cause for any purpose it may retain the cause for all purposes, and proceed to a final determination of all the matters put at issue in the case. 1 Pom. Eq. Jur. § 181, and cases cited. In *Wilson v. Johnson*, 74 Wis. 337, 43 N. W. Rep. 148, it is said: "An action to enforce a lien upon a pledge is an equitable one, triable by the court." In *Loan Co. v. Wentworth*, 25 Pac. Rep. 298, the supreme court of Washington says: "As the foreclosure of a mechanic's lien is a proceeding cognizable in a court of equity, the mere fact that the defendant in such suit interposes a counterclaim for damages, as he is allowed to do by the laws of Washington, is not sufficient to divest such court of its jurisdiction, and to entitle the defendant to demand a trial by jury." This court said in *Dohle v. Machine Co.*, 15 Neb. 436, 19 N. W. Rep. 641, that "an action to foreclose a mechanic's lien is essentially a suit in equity, and a party is not, as a matter of right, entitled to a jury trial therein." See, also, *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. Rep. 551; *Ryman v. Lynch*, 76 Iowa, 587, 41 N. W. Rep. 320. After the evidence was in, it appeared that the grain called for by the warehouse receipts sought to be foreclosed had been already disposed of by the appellant, and his counsel now contends that the court should have then impaneled a jury. But this position is untenable. The court was sitting in equity. It had before it on the pleadings an equitable action, and it did not lose its jurisdiction because the evidence discloses that the only adequate relief it could afford was a personal judgment. *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. Rep. 75. The court was right in refusing the appellant a jury trial.

The contract between the appellant and appellees contained this clause: "This contract shall be terminated on the first day of March, 1890, Wanzer & Co. reserving the right to terminate the same by giving thirty days' written notice; and on the termination of this contract, either by such notice or at the expiration of the time herein agreed, said Wanzer & Co. shall be entitled to collect from said Morrissey a sum equal to one-half the charges said Wanzer & Co. would receive on the grain said Morrissey

shall then have on hand, according to the aforementioned rates in this contract." On November 18, 1889, appellees notified appellant in writing of their election to terminate said contract on December 20, 1889, and on said last date appellees terminated the contract. The appellant's next point is that the contract between him and the appellees was to continue in force until March 1, 1890, notwithstanding the agreement therein that the appellees might terminate it sooner. Appellant bases this contention on an agreement which he alleges existed between himself and appellees to that effect, outside of the instrument itself. The court found this issue against the appellant, and rightfully so. We cannot stop here to quote the correspondence between the parties leading up to the execution of this agreement, but it settles beyond all doubt that the contract as signed and as it exists is in all respects as all parties thereto understood it at the time of its execution. The evidence shows that the appellees refused absolutely to contract with appellant on any terms, unless the right to terminate the contract on 30 days' notice was reserved to them in the instrument. There was much correspondence between the parties on this very clause, prior to the execution of the contract; and it is a waste of words, in the face of this record, to say that appellant did not know that the right to terminate the agreement was reserved, or that there was any agreement or understanding, even on appellant's part, that the contract should, at all events, run to March, 1890. Appellant contends, however, that notwithstanding the clause in the agreement reserved to appellees the right to terminate it on giving 30 days' notice, the contract could not, as a matter of law, be thus terminated. We do not so understand the law. When the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; and the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience. In *Ireland v. Dick*, 18 Atl. Rep. 735, the supreme court of Pennsylvania says: "The appellants accepted a license from the appellees for the manufacture of drilling jars. * * * The agreement was in writing; that is, it was a printed form, filled in as to names, dates, etc., in writing, and with the addition in the right-hand margin of the following stipulation: 'It is agreed by the parties of the first part that the parties of the second part can cancel this license by giving thirty days' notice in writing.' This portion of the instrument * * * is presumed to express the exact agreement of the parties upon the subject. Both of the parties acted under the agreement until December 19, 1878, when the licensees under the written clause * * * sent a notice to the licensors in the following terms: 'We

wish to cancel our license concerning the manufacture of drilling jars * * * as per contract.' It is entirely clear that this letter was an absolute and complete rescission of the agreement."

The district court found that the appellant was not entitled to recover any damages from the appellees by reason of their having terminated the contract, and that finding is the next in order of appellant's complaints; and this claim for damages is based solely on the assumption that the appellees violated their contract with the appellant. But did they? The contract was terminated in accordance with its provisions. There is no evidence tending to show that it was terminated by the appellees for a sinister purpose, nor that in exercising their right to terminate it they acted maliciously or arbitrarily. Indeed, the evidence would support a finding that the appellant's own violation of the contract afforded sufficient grounds for its termination by the appellees, had the contract by its terms required the existence of such grounds as a prerequisite to the right of the appellees to terminate it. The evidence shows that the appellees, however, in no respect violated either the letter or spirit of the contract; nor has the appellant sustained any damages by reason of its termination for which appellees can be made liable. The losses, if any, suffered by the appellant in consequence of the termination of the agreement, were such only as he must have known, when he signed the contract, might ensue if it should be terminated according to its provisions.

The appellant also claims that the court's finding that the contract between the parties thereto was not usurious is erroneous. By the terms of the contract appellant was to pay 7 per cent. interest on all money loaned him by the appellees, the money borrowed to be used in the purchase of grain. Appellant was to pay appellees a commission of one-half of one cent per bushel for selling grain shipped to them and \$2 per car on diverted shipments; that is, for all grain he shipped to others than appellees, and which grain had been purchased with money furnished by them. Appellant was also to sell through the appellees, for future delivery in Chicago market, corn to equal the amount of ear corn purchased by the appellant with the money borrowed; and for making these sales appellant was to pay appellees one-sixteenth of one cent per bushel on all corn appellant had on hand at the close of each month. Appellant now contends that as the amount paid appellees on diverted shipments, \$412, the amount paid for commission on sales for future delivery, \$189.24, added to the amount paid as interest, \$788.48,—exceeded 10 per cent. interest on the money during the time it was loaned; that, therefore, the agreement was usurious. The contract is not on its face necessarily a usurious one. Appellees were engaged in the buying and selling of grain on commission,

and had a right to lend their money at lawful rates of interest to such parties and on such terms as would probably increase their commission business, and out of which increase they might derive additional profit. The circumstance that their profits growing out of the transaction covered by the contract exceeded the legal rate of interest on the amount of money actually embarked in the enterprise does not afford conclusive proof that the agreement was in fact a usurious one. At the most, this circumstance was evidence tending to show that the intention of the parties was to make the contract a cover for usurious transactions. The question is: Were these charges for diverted shipments and for making sales for future delivery honestly so intended by the parties as compensation for such services, or were these charges invented as a cover for usury? This was a question of fact for a trial court to determine. He has found that the transactions were not usurious ones, and the evidence supports that finding. *Cockle v. Flack*, 33 U. S. 344; *Beekwith v. Manufacturing Co.*, 14 Conn. 594.

Finally, it is said by the appellant that the contract between him and the appellees was a gambling contract, and void. If this is so, it must appear either from the instrument itself or from the transactions of the parties under it. The expressions in the contract which it is alleged show it a gambling contract on its face are as follows: "Said Morrissey further agrees to sell through said Wanzer & Co., for future delivery in the Chicago market, corn equal to the amount of ear corn purchased with funds furnished by Wanzer & Co., which sales may be changed from month to month, as may be directed by said Morrissey. For the purchase and sale of this corn said Morrissey agrees to pay said Wanzer & Co. one-sixteenth of one cent per bushel per month on all corn on hand at the close of each and every month, which shall cover the charges of change from month to month; and, if purchases and sales of this character are made in any month in excess of the corn on hand, the charge of such purchase and sale, or sale and purchase, shall also be one-sixteenth of one cent per bushel. Said Morrissey further agrees to pay interest on all sums said Wanzer & Co. may deposit as margins on transactions in his behalf, and said Wanzer & Co. shall notify said Morrissey of the deposit of said margins." The substance of the first quotation is that the appellant would sell through appellees, in the Chicago market, for future delivery, as much corn as appellant purchased with the money borrowed of the appellees; in other words, it was an agreement to sell grain for future delivery. "The sale of grain for delivery in the future is a valid contract." *Gregory v. Wendell*, 39 Mich. 337. "If a party has property under his control he has a right to sell it to be delivered at a future time." *Sanborn v.*

Benedict, 78 Ill. 309. "The purchase of grain at a certain price per bushel, to be delivered in the future, is not an illegal or gambling contract." *Pixley v. Boynton*, 79 Ill. 351; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160. "The validity of option contracts depends upon the mutual intention of the parties. If it is not the intention in making the contract that any property shall be delivered or paid for, but that fictitious sales shall be settled on difference, the contract is illegal; but if it is the good-faith intention of the seller to deliver, or the buyer to pay, and the option consists merely in the time of the delivery, within a given time, the contract is valid, and the putting up of margins to cover losses which may accrue from fluctuations of the price is legitimate and proper." *Bank v. Carr*, 15 Fed. Rep. 438, cited in *Whitesides v. Hunt*, 97 Ind. 191. "A bona fide contract for the actual sale of grain, deliverable within a specified future month, * * * is not a gambling contract." *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. Rep. 221. "Contracts for future delivery of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, are valid if, at the time of making the contract, an actual transfer of the property is contemplated by at least one of the parties to the transaction." *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950. It seems settled from the foregoing authorities that this agreement to sell grain for future delivery is not, on its face, a gambling contract.

The substance of the second quotation is that the appellant agreed to pay interest on all sums of money appellees might advance for him as margins on transactions in his behalf. What transactions? Gambling transactions? We do not think such is a fair construction of the language of this instrument. "Where a contract is capable of two constructions, the one making it valid and the other void, the law will adopt the construction that upholds the contract." *Whart. Cont. § 337*. To say that this clause shows that the intention of the parties to the contract was to engage in gambling transactions in grain under it would be a forced construction of the language. "A contract for the sale of grain for future delivery being legal, it logically follows that the agreement of the appellant to pay interest on moneys advanced for him by the appellees to protect these sales against the fluctuations of the market did not taint the contract with the vice of gambling." *Gru-man v. Smith*, 81 N. Y. 25; *Gregory v. Wendell*, 39 Mich. 337. In *Rudolf v. Winters*, 7 Neb. 125, this court said: "A contract to operate in grain options, to be adjusted according to difference in the market value thereof, is a contract for a gambling transaction, which the law will not tolerate." We adhere to that decision. To the same effect, see *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. Rep. 776; *Sprague v. Warren*, 26

Neb. 326, 41 N. W. Rep. 1113; *Watte v. Wickersham*, 27 Neb. 457, 43 N. W. Rep. 259. But the contract we are considering does not come within the rule laid down by those cases. The true question here is from the terms of this contract, what was the intention of the parties thereto? Was their intention to buy and sell grain upon the market, and settle the differences without any delivery? If so, the contract was a gambling one, and void. But to render a contract invalid it must appear, either from the instrument itself or from the evidence outside, that at the time of its execution the mutual intent of the parties was that no deliveries of grain should be made under it, but the difference in the price paid. We are of the opinion that this contract, on its face, cannot be held a gambling one.

But appellant insists that if this agreement cannot be construed from its text to be a gambling contract, such facts nevertheless appear of evidence. We cannot quote all the testimony to this point. The appellees testified that they had no intention by entering into this contract to speculate or gamble in the price of grain. The appellant testified as follows: "Question by the Court: What do you mean by 'selling for future delivery?' Answer, I will explain that to your honor. We in the grain business build cribs and elevators for the purpose of getting storage out of our grain. We buy the grain from the farmer in November and December and January, during the winter months, when there is good storage charges. The winter storage is generally about 4 cents from December until May. * * * Now, when a man takes and fills a crib up in November he has money to pay for it,—he has money to pay for it in the bank,—and he don't ship it out, but puts it in the crib, and fills the cribs up; and as he fills the crib he wires a commission house in Chicago, 'Sell 5000 bushels March delivery against my actual corn in crib.' Q. Then he actually intends to deliver that corn? A. Yes, sir. Q. Is that a gambling contract? A. That is not a gambling contract when you sell corn in crib for future delivery, when you have the actual corn. Q. Was there anything of that kind in this contract between you and Wanzer & Co.? A. I don't think there was any gambling any different from selling against the corn which was being held in cribs. A. Anything in the contract? A. Not on my part, any other intention than that I went into this contract for to get the storage charges. I had money enough to run this business. The object was to put the corn in store, and get the winter storage on it. * * * That was the inducement for going into that contract." The record also shows that the appellant from time to time sold for future delivery as much grain as he had on hand, and when the time arrived to make delivery, instead of shipping the grain he had in the cribs, he would buy grain on the market to

fill or offset the sales made, and resell the grain on hand for a future delivery. These transactions, or rather the record of them, would make it falsely appear that the appellant sold very much more corn than he ever paid for during the time of the transactions; and it is this feature of the dealings of the parties that appellant's counsel claims establishes by the acts of the parties to the contract under it a gambling character. But we think this is not a fair deduction from the evidence. It shows that all these sales and purchases of appellant on the market were based on grain he had on hand, and that this selling and buying on the market was not dealing in options, not betting on the rise and fall of the market, but purchases made to fill sales he had previously made, and thus obviated the necessity of delivery of the grain he had in his cribs in Nebraska. The case of *Douglas v. Smith*, 74 Iowa, 468, 38 N. W. Rep. 163, is one in which the facts were substantially the same

as in the case at bar, and that court said: "Where country grain buyers had a large quantity of corn in cribs, and they made sales from time to time, through Chicago commission merchants, for future delivery of No. 2 corn, but fearing that their corn would not grade No. 2, and hoping that it would improve with age, they bought in and resold, intending to deliver the corn to cover their sales, held, that the transactions were not illegal, so as to defeat their brokers in the collections of the margins advanced for them." The facts in this case bring the transactions of the parties within the operation of the decisions of the case last above cited. The preponderance of the testimony establishes the fact that the sales made by the appellant were not wagers, but that the grain was to be actually delivered at the time agreed upon. The decree of the district court is right, and the same is in all things affirmed. The other commissioners concur.

WHITE v. BARBER (two cases).

(8 Sup. Ct. 221, 123 U. S. 392.)

Dec. 5, 1887.

Error to the circuit court of the United States for the Northern district of Illinois, and appeal from the circuit court of the United States for the Northern district of Illinois.

The first one of these cases is an action at law brought on the tenth of May, 1883, by James B. White against George M. Barber, in the superior court of Cook county, Illinois. The declaration demanded the sum of \$15,000, and declared on the common counts. The defendant pleaded non assumpsit. In June, 1883, the cause was removed by the defendant into the circuit court of the United States for the Northern district of Illinois. At the trial, in February, 1884, there was a verdict for the defendant, followed by a judgment for him, to review which the plaintiff has brought a writ of error. There was a bill of exceptions, the whole of which is, in substance, as follows:

The plaintiff introduced the following evidence:

James B. White, the plaintiff, testified that now, and during the time in question, he resided at Fort Wayne, Indiana, engaged in the business of dealing in general merchandise; that in 1879, and prior thereto, one A. S. Maltman, of Chicago, acted as his agent in purchasing and forwarding merchandise of various kinds. "About September, 1879, desiring to do some trading on the board of trade, Chicago, I asked Maltman to recommend some good responsible broker on the board of trade, through whom I could do business; that Maltman recommended the defendant, who then, and during the time in question, was a broker residing in Chicago, and doing business on the board of trade; that thereupon I commenced trading on the board, sending my orders at first to Maltman, who communicated them to the defendant; that about December, 1879, I came to Chicago, made the acquaintance of defendant, and thereafter did business directly with him; that I continued to do business with defendant during the years 1879, 1880, 1881, and 1882, buying and selling on the board, through the defendant, as broker, corn, wheat, oats, pork, and other commodities, and that about April 19, 1882, I had a settlement with defendant, in which all previous dealings were adjusted; that up to this time the transactions which I had made through defendant on the board amounted to \$105,000 in 1879, \$1,718,000 in 1880, \$540,000 in 1881, and \$672,000 in 1882; that in November or December, 1879, and at other times prior to the settlement in April, 1882, I had conversations with the defendant in which I told defendant that I was a merchant in Fort Wayne, and did not want it known that I was engaged in speculating on the board of trade in Chicago, as it might affect my credit, and that the account could be kept in the name of A. S. Maltman; that I considered it a hazardous business, but was willing to gamble provided I could have a fair show; that I wanted my deals placed with responsible parties, so that I could get my name

when I made it; that I didn't want any of the property, but meant simply to do a gambling business; that defendant told me [plaintiff] that he knew what I wanted; that Maltman had explained my situation and business; that he would deal only with responsible parties, and the deals should be settled so as to get the profits or losses; that defendant told me [plaintiff] that not one bushel in a million that was bought and sold on the board was legitimate business; that a few of the large houses did some legitimate business, but most of it was simply trading in differences; that he [defendant] did nothing but business of the latter kind; that he dealt mostly for himself; that he did a good deal of 'scalping,'—deals made and closed the same day, on the turn of the market; that he did not let his deals run over night; that, up to April, 1882, I [plaintiff] never delivered or received any of the property so sold or bought, nor was anything ever said by defendant to me about receiving or delivering the property or making arrangements to do so; that, from time to time defendant rendered statements to me [plaintiff] showing the deals made, the price per bushel, or, in case of pork, the price per 100 lbs., at which the commodity was bought and sold, the difference in dollars and cents, the commissions charged, and the total debit or credit passed to my account; that all the deals made were in form contracts for future delivery, in which the seller had the option of delivering at any time during some future month; that up to April, 1882, all trades made by defendant for me [plaintiff] had been settled or closed by counter-trades prior to the month in which delivery could be made; up to April 19, 1882, no commodities had been delivered to or received on these trades, nor had any suggestion or requirement on the part of Mr. Barber to deliver been made; that defendant never reported to me the names of the parties with whom trades were made on my account, and that I never knew or inquired who such parties were; that, after the settlement in April, I commenced selling wheat for July delivery, and by the last of May had sold, through defendant, 100,000 bushels for that delivery, which are the trades in question in this case; that there was a corner in July wheat, and the price was forced up ten or twelve cents; that on the last of July I came to Chicago, had an interview with defendant in the morning, in which he [defendant] proposed to make a tender of No. 2 red winter wheat, the kind sold being No. 2 spring wheat; that No. 2 red winter is intrinsically more valuable than No. 2 spring, but that on the last of July the former stood at 98 cents per bushel, and the latter at \$1.35 to \$1.37; that I [plaintiff] knew of the tender, and I did not object; that I met defendant later in the day, and was informed by him that he had borrowed warehouse receipts for ten thousand bushels No. 2 red winter wheat, and had made a tender of the same to the several parties to whom he had sold the wheat, and that such tender was in every case declined, and that said tender was made unles

the following rules of the board of trade, viz.: 'On contracts for grain for future delivery, the tender of the higher grade of the same kind of grain as the one contracted for shall be deemed sufficient, provided the higher grade of grain tendered shall not be of a color or quality that will depreciate the value of the other, if mixed.'

"Prior to December, 1-79, I bought, through defendant, 100,000 bushels of corn for December delivery. I came to Chicago, and defendant told me the deal had gone against me \$4,500, and he said I had to close it that day. The loss was that amount, and I paid it that day. No corn was delivered on either side. In January, 1880, I sold, through Barber, 20,000 bushels of wheat. My profit was \$400. I did not take the profit, but sold more, and the deal went against me \$2,000, and I paid it up. I then commenced buying, and made \$600 on March wheat bought in January. I commenced selling wheat in March, 1880, and made a good deal of money for a few months; recovered losses in April, and commenced selling May wheat. The May options took a sudden start up, and I lost \$8,000, and I paid it. It was expressly stated by me to Barber that I wanted no property. He knew that. He said, 'Certainly, I know that,' and that the deals should be settled on the margins,—on the profits. Up to April, 1882, nothing had been delivered by me or received by me, nor had there been any suggestion or requirement on defendant's part to deliver made on the other hand, it was never expected to handle the property, but merely to trade in the different deals. Up to the close of the July deal, 1-82, no demand had been made on me by Barber for the delivery of wheat or corn, or any other commodity. That I received the following statement of account from defendant about the day of its date, [which was read in evidence:]

		Chicago, October 30, 1882.	
		A. S. Maltman (J. B. W.) in acc't with G. M. Barber,	Ct.
1882.	July	By balance,	\$12,000 00
		Do draft,	3,000 00
	Sept.	By profit as per statement read,	2,431 57
		Do draft,	2,431 57
	Octo.	By balance,	300 00
		Do draft,	300 00
	July	To loss as per statement read,	2,668 75
	Aug.	Do draft,	400 00
	Sept.	By balance,	3,000 00
		Do draft,	400 00
	Octo.	To loss as per statement read,	887 50
		Do draft,	11,412 50
		To balance,	\$18,568 75
		October 30, By balance, being diff. between price,	\$1,412 50

"I have 100 M July spring wh't sold for you, and the settling price of same as fixed by board of trade, (1.35,) including coms., 1/4c."

"That the item of \$12,000 balance in said account consisted of money advanced and paid to the defendant; that the item, 'July 3rd, by draft, \$3,000,' consisted of \$3,000 money paid the defendant by means of a draft."

Plaintiff testified, further, that "on April 2, 1883, I served the following notice upon the defendant, by delivering to him a copy thereof. The defendant read the notice, admitted he had the money in his hands, but declined to pay it over." The notice was offered in evidence, and is as follows:

"To G. M. Barber, Esq.: In a statement made by you, dated October 30, 1882, of deals made on my account on the board of trade, Chicago, you acknowledge a balance in your hands of \$11,412.50 in my favor, being, so the statement says, the difference between price you sold 100 M July wheat for me and the selling price of same as fixed by the board of trade, \$1.35, including your commission of 1/4 cent. Now you are hereby notified that I claim all contracts for sale of said wheat to be illegal and void, and forbid you to pay over any part of said money or balance to any one, and I further demand the immediate payment thereof to myself. James B. White."

"Dated Chicago, April 2, 1883."

On cross-examination plaintiff testified that, during all the time he traded through defendant, Maltman continued to some extent to act as his agent in the business with defendant; that he received some profits debited to him in the statement offered in evidence; that defendant complied with his orders, so far as he knows; that he didn't think defendant had anything to do with the corner in wheat; that he (plaintiff) had nothing to do with the appointment of a committee by the board to fix a selling price for July wheat; that he knew what was going on, and talked with A. M. Wright and other members of the board of trade about the deal, but did not enter into any agreement or arrangement with the other brokers similarly situated to the defendant in regard to legal proceedings to prevent the consummation of the corner; did not employ counsel on behalf of defendant, or authorize any steps to be taken in his name; that he (plaintiff) was an outsider, and was not recognized in that matter; that he did not agree to pay attorney's fees, but expected he would have to do so, and did after the litigation was over; that he knew a bill was filed; that the matter was contested and decided by the supreme court in favor of the cornerers. The litigation was after a committee appointed by the board had fixed the selling price at \$1.35.

In the progress of the case the plaintiff testified further, among other things: "I left it for Mr. Barber to put the contracts in form when I wished him to buy or sell. I understood that he would go on the board of trade and either buy or sell, and I understood that he did go on the board of trade and buy and

sell according to my orders. There was no disobedience of my orders, so far as I know. I have no complaint to make on the score of nonobservance of my orders. I knew that while we thought the corner in July wheat was about to culminate, buying wheat at Milwaukee or elsewhere to fill orders was talked about,—a great many talked of it,—but it was considered that parties who attempted that got beaten, because they simply dropped the grade on them. It is possible I may have talked with Maltman about the possibility of buying wheat in Milwaukee to fill my orders, but I never dreamed of it. I said some were doing it; some did do it. It was generally talked that some people had done it, and as to the propriety of doing it. It was only three cents, I think, to bring it from Milwaukee here, and twelve, fifteen, or twenty cents, somewhere along there, lower a bushel, and they could fill their contracts here with it, and not lose so much as they would in the extortion of the corner. I might have said, 'Well, it could be done.' 'I wish I could do it,' or something of that kind. I knew Barber, being a member of the board of trade and making contracts on the board for me, would be obliged to observe the rules of the board. I understood there was a rule that one must keep his margin good. I told him to buy, and told him to sell, and told him to sell out, and when to cover and when to close trades, and he observed my orders. If there was any corner it was not my fault, as I was selling, and it was not from Barber's fault, so far as I know. After he made the tender of red winter wheat on the thirty-first of July, 1882, I approved of what he did. I went to see Mr. A. M. Wright, who was one of the parties proposing to file a bill to question the propriety or binding force of a finding of a committee of the board of trade fixing the settling price for July wheat. I saw published a communication in the paper, an interview with the reporter, in regard to this corner, or at least he published a communication, and I went to see him, and consulted with him about it. The complaint was that the price of July wheat was put too high on the thirty-first of July. Barber had spoken about the contracts being under the board of trade rules. After the culmination of the corner I got a copy of the rules,—printed copy. He showed me the rules under which the committee was appointed. I think the rule is on page 51 of Rules of 1882, § 3. Mr. Wright believed it was a legal tender; so did I. I believed that 'red' would be a good tender. I went to see counsel. It was John E. Burke. He was a lawyer, who had charge of what he called 'Contested Cases.' There were some thirty-two members of the board in contested cases, and Mr. Barber joined in with them. I footed the lawyer's bill; that was all I did. I told Mr. Burke that I was one of the fellows that got bled in this affair, and I did not want to stand it if he could help it. He was seem-

ingly as much out of humor about it as I was, as far as the situation was concerned,—the unfairness of it. When it came to pay for the expense of those legal proceedings, the bills were presented to Mr. Barber and Mr. Maltman, and I told them to pay them and I would pay them back; and I did. I went with Mr. Wright to Mr. Burke. Mr. Barber was away from home at the time. I told Mr. Burke the situation I was in, and he said: 'Well, when your broker comes here, have him come up and see me.' It was understood that Mr. Barber was my broker or commission merchant, and, when he returned, he went and joined in with the others to contest this thing. I knew how the matter progressed after that. It was contested in the court; in some formal way to get into the supreme court. There was a pro forma decision in the court here, and the case was taken to the supreme court, and was there determined in favor of the cornerers. That was after the committee of the board of trade appointed under these rules had been appointed. The case went to the supreme court. We simply had to have patience to wait until they determined it. They determined it about a year ago last January,—that is, in January, 1883,—before I had served notice on him. In most cases where I bought or sold, I closed before the end of the month in some way,—either sold out or covered it. If I bought wheat of a man for the month of July, he had the whole month of July in which to tender to me. During the whole of the month of July I had an option at what time I would deliver. The buyer has to close his trade the first of the month, and the seller has to the last of the month, or, if he pleases, he can close between times."

George M. Barber, defendant, being first duly sworn, testified as follows: That after the notice was served upon him by plaintiff, in April, 1883, he paid over to the various parties to whom he had owed the wheat in question the sum of \$11,412.50, less the amount of his commissions, which were \$250; and, on cross-examination, that he made such payment because charges had been preferred against him and he had to pay or be suspended from the board.

Plaintiff here rested his case, and the defendant, to maintain the issues on his part, introduced the following:

George M. Barber, defendant, who, being recalled, testified that he was a commission merchant and member of the board of trade; that he was employed by Maltman to trade for plaintiff on the board of trade,—to make trades there; that, in executing the orders of plaintiff, he dealt with other members of the board; that he did not seek commission business, but dealt mostly on his own account; that once, when White was hanging on to a deal which had gone against him, witness told him that witness never hung on to a deal, but in his own trades generally calculated, when he

went home at night, to have an equal amount bought and sold, so that he would not be affected by the fluctuations of the market, but did not say to Mr. White that White's business would be conducted in that way. Witness had to be governed by White's orders, which were to do so and so; did not recollect plaintiff saying that he wanted to gamble on the board; that the manner of making trades on the board is as follows: If the order was to sell, he would go on the board and offer to sell so much wheat at such a price, and some other broker would accept the offer, or some other broker might offer to buy, and he (defendant) would accept the offer, and thereupon both parties made a memorandum of the trade on a card, without comparison; that such memorandum was usually as follows, (referring to a card,) this being one of the trades in question: "10 M, July, H. G. Gaylord, 1.25 $\frac{1}{2}$," J. B. W.;" that this was the only writing made in the hurry of business on the board; that "10 M" meant 10,000 bushels; "July" meant for delivery in July, at the seller's option; that No. 2 spring wheat was understood; that "H. G. Gaylord" was the name of the broker to whom the sale was made; that "1.25 $\frac{1}{2}$ " denoted the price, and the initials "J. B. W.;" indicated that the sale was on account of plaintiff; that their trades were afterwards, on the same day, entered on the books of the respective parties, and their clerks went round and compared and checked them off; that this was the case with the sales of 100,000 bushels for delivery at seller's option during July, 1882, (the deals under consideration); that he had no different agreement with any of the persons with whom he dealt for plaintiff; that the grain was to be delivered or received; that "puts" and "calls," or mere options to buy or sell, were not recognized on the board; that it is customary, where a commodity is sold to and bought of the same broker, upon different orders, for the brokers to settle their trades by paying the difference, as the case may be. (And a rule of the board of trade allowing such transfers was read in evidence.) That he never told plaintiff that trading on the board was illegitimate, but may have told him many of the other trades were settled up, or offset, without delivery. The volume of transactions was too large to make delivery practicable in all cases. As to the conversation between witness and White, November 30, 1879, witness stated he believed it was the first time he met White, for whom there were then to mature contracts to buy 100,000 bushels corn, and witness told White that the chances were strong that the corn would be delivered, and he must either furnish the money to pay for it or order him to sell it, so that he would have a place to put it, when delivered, or could make arrangements to transfer it; that in the contracts for Mr. White witness had received and delivered property; had received as high as 60,000 bushels in a day; that, at

the request of plaintiff, he did not settle the deals for July, but made default as to the 100,000 bushels. "Mr. Maltman, for Mr. White, gave me the draft of \$5,000, June 12, 1882. I was required to give my word that I would not buy in the wheat unless by his orders, but would allow him to default, and Maltman told me that White said he would settle,—let the committee fix the price, and he would settle that way, if possible, if he did not decide to buy in the wheat." White sent witness a telegram from Fort Wayne, August 5, 1882, as follows: "Don't cancel the July trades. My attorneys here believe the tender we made is good, and can be enforced. J. B. White." (Telegram read in evidence.) There were about 30 other brokers who made default; that a committee was appointed in accordance with the rules of the board, who fixed the settling price at \$1.35; that thereupon the brokers filed bills in court, to enjoin the board from suspending them for not settling at the price fixed by the committee; that he returned to the city about September 10, 1882, after being absent a month or more, and was informed by Maltman that the plaintiff had made arrangements for him to join in the injunction proceedings; that the next day he went to the office of J. E. Burke, the attorney for the defaulting brokers, and signed and swore to a bill for the purpose above stated; that said bill was filed; that afterwards the supreme court rendered a decision adverse to the prayer of the bill, and the bill was dismissed; that plaintiff was informed of the result, and paid the attorney's fees and damages in the case; that plaintiff did not suggest the making of any further contest; that at the time plaintiff made the demand upon him, April 2, 1883, the money in question was under his control, except \$6,700, which had been deposited in the bank as margins, on account of some of the deals; that he frequently received and delivered grain; had received as high as 60,000 bushels in a day; that he could not recall any trade in which he bought for Mr. White where he received any commodity, but had no doubt at all in all his tradings he did receive a good deal, but could not recall any particular instance. "There was a certainty that delivery would be made, unless, after the trades were made, I made offsets. I always do get more or less; do not expect it will all be delivered. I expect I can offset trades with a good part of it." When the 100,000 bushels in question were sold, witness expected it would be delivered; that he would buy here in the market, the largest grain market in the world.

Thomas W. Burns, being duly sworn, testified for the defendant that, in 1882, he was a member of the firm of Ulrich, Busch & Co., and a broker on the board of trade; that, on May 17, 1882, he bought of defendant, for his firm, "5, July wheat, at 1.24 $\frac{3}{4}$," No. 2 spring wheat, (5,000 bushels) that the contract was made in the regular way; that

there was no secret understanding or agreement that it was not to be executed, or that it was to be settled; that the wheat was to be delivered at any time in July, at the seller's option.

Abel H. Bliss, being duly sworn, testified for defendant that he was a member of the board of trade, and was doing business as a commission merchant in 1882; that in May he bought 10,000 bushels July wheat (No. 2 spring, deliverable at seller's option at any time during July) of defendant, which he never received; the wheat was to be delivered in July, at the seller's option; that there was no agreement that the wheat was not to be delivered, or that it was to be settled; that he certainly expected to get the wheat.

It was admitted that the other brokers to whom defendant had sold the wheat in question would testify in a similar way, as to the trades with them, respectively.

Alexander S. Maltman, being sworn, testified, for defendant, that he was of the firm of A. S. Maltman & Co., and was engaged in the commission business in Chicago; that he acted as agent for plaintiff, in his transactions with defendant; that he never told defendant that the transactions were to be of a gambling or fictitious character; that his instructions from plaintiff were for the most part contained in telegrams and letters, and these he gave or showed to defendant; that the transactions were quite continuous; that, in July, 1882, he had several conversations with plaintiff as to Barber defaulting; that when the price was up in the thirties, plaintiff was unwilling to advance more margins unless defendant would agree to default, and that he procured such an agreement from the defendant at the request of plaintiff; that, after default had been made, plaintiff said he was willing to leave it with the committee to be appointed by the board; that he went with plaintiff to the office of Burke, the attorney; that plaintiff went there to get out an injunction to prevent the board of trade from suspending defendant; that he paid out for plaintiff on account of the said suit \$283.50, which plaintiff had repaid him.

George F. Morecom, being duly sworn, testified for defendant that he was of the firm of A. S. Maltman & Co.; that he heard plaintiff say that the tender of No. 2 red winter wheat was good; that, according to their own rules, they were bound to accept it; that plaintiff said that he desired Mr. Barber to default on the deals and let the matter go to a committee and let them fix the price, and said that he would see that Mr. Barber was protected.

Dewille C. Bannister, being duly sworn, testified for defendant that during the time in question he was book-keeper for defendant; that plaintiff, at the time the injunctions were being obtained, went to Mr. Burke's office to see about the matter, and said he wished he would take the matter

into his own hands; that Mr. Barber did not pay over the money until it was necessary to do so in order to save himself from being suspended from the board.

The bill in chancery above referred to, being a bill filed in the superior court of Cook county, by George M. Barber, in the interest of or for the benefit of the plaintiff, on the eleventh of September, 1882, making the board of trade of the city of Chicago party defendant, was, together with a copy of the injunction issued in pursuance of the writ, read in evidence. It set forth certain sections of the charter of the board of trade, and referred to a copy of the rules of said board in force January 1, 1882, making such copy a part of the bill as an exhibit, and referred also to sales of No. 2 spring wheat, made by defendant for delivery in July, 1882, and alleged that there was an unlawful combination to prevent the complainant and others situated like him from fulfilling their contracts, etc., and set forth a certain rule of the board of trade providing, among other things, for the appointment of a committee to determine disputes as to the price of property, in case of supposed excessive claims for damages being made under contracts, on default, etc., and showed that application for the appointment of such committee was made with reference to the defaults made upon contracts for delivery of No. 2 spring wheat in July, 1882, and showed that the committee determined the price for settlement at \$1.35 per bushel; and the decision of the committee was drawn in question by the bill upon various grounds, not drawing in question the validity of the contracts, but questioning whether the board of trade had power to compel members to abide the decision of such committee, and also questioning the regularity of the appointment of the committee, and charging that, in the conduct of the hearing had before the committee, and in the finding of the committee, the spirit of the rules of the board of trade was violated by putting it in the power of persons who had been concerned in cornering the market to get excessive damages, etc. The bill pointed out certain rules of the board of trade under which, in case a member failed to comply promptly with the terms of any business contract or obligation, or failed to satisfy, adjust, and settle the contract, or failed to comply with or fulfill any award of the committee of arbitration, or committee of appeals, made in conformity with the rules, regulations, and by-laws of the association, he should, upon admission or proof of the delinquency before the board of directors, be subject to be suspended from all privileges of the association, etc.; and an injunction to prevent suspension or expulsion, and especially to restrain and enjoin the board from accepting, treating, or recognizing the decision of the committee aforesaid as in force, or as having any effect, was prayed for by the bill. Such injunction was

ordered, and was issued September 11, 1882, and was served on the board. There was also introduced a certified transcript of the order of said superior court, made on the eleventh of October, 1882, dissolving the injunction, and assessing damages on account of the issuing of the same, but showing that, by stipulation, the cause was to abide the final result of the case of *Abner N. Wright et al. v. The Board of Trade of the City of Chicago*, in the appellate court or in the supreme court, and that, in case of the reversal of the decree in that case, then the decree in the Barber Case should be set aside on his motion, and the injunction in his favor was continued. This decree was to be regarded as final in case the decree in the Wright Case should be affirmed, except that, in such case, the injunction was to be dissolved, on defendant's motion. The transcript further showed that, on the sixteenth of April, 1883, the said superior court, in the said chancery suit of Barber, vacated the order to continue the injunction, and the bill thereupon stood dismissed under the previous order of the court, this being because the supreme court had, in the Case of Wright, affirmed the decree of the superior court dismissing his bill. It appeared that, after the decision of the Wright Case, inquiry was made of the plaintiff as to whether he wished anything further done in reference to the prosecution of the chancery suit in the name of Barber, and he replied: "Further appearance not necessary."

It further appearing, from the testimony, that the plaintiff paid the damages which were assessed against Barber on account of the issuing of the injunction, the testimony of the witness Barber tended to show that, at the time of the delivery by defendant to the plaintiff of the statement aforesaid, dated October 30, 1882, the balance of \$11,412.50 therein mentioned, that amount being the difference between the price at which the 100,000 bushels of wheat were sold for July delivery, and \$1.35 per bushel, the selling price so fixed by the committee,—that is, the difference over and above the commissions of one fourth of a cent per bushel charged by the defendant,—was to remain with the defendant, to await the action of the court upon the aforesaid bill in equity, seeking to impeach the decision of the committee fixing the settling price, and that, after that matter had been litigated in the courts, through the suit so brought in favor of Wright, which was made a test case, complaints were made before the board of directors of the board of trade against the defendant on account of default on his part in performing or settling the contracts for the sale of the said 100,000 bushels of wheat, notice of one or more of which complaints was given by defendant to plaintiff, and the defendant appeared before the directors to make defense, but did not succeed in making any defense, and, being about to be sus-

pended unless he settled, did thereupon settle by paying according to the decision of the committee declaring \$1.35 per bushel to be the settling price, so that the moneys paid out by defendant, together with his commission, exhausted the said sum of \$11,412.50; and this was prior to the commencement of this suit, but after the notice of April 2, 1883, above set forth. The testimony tended to show that this money was left in defendant's hands by Mr. White, when the aforesaid statement of account stating said balance, etc., was given by defendant to the plaintiff, and was so left for the protection of the defendant, as to the contracts, with reference to the litigation arising as to whether the decision of the committee should be allowed to be binding in regard to the settling price.

On the foregoing evidence, the plaintiff claimed to recover the before-named sum of \$11,412.50, as money placed by him in the hands of the defendant for the purpose of dealing in gambling contracts at the Chicago board of trade, and which contracts, it was asserted, were made illegal by a statute of Illinois. The court charged the jury, among other things, as follows: "The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the board of trade, through the defendant, as his broker, were gambling contracts, within the meaning of the law. The statute of the state of Illinois upon the subject I will now read you. Section 130 of chapter 38 [Hurd, Rev. St. Ill. Ed. 1883, p. 394; Ed. 1885, p. 405] reads as follows: 'Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' The plaintiff contends that the contracts in question, made by the defendant for him and in his behalf, were gambling contracts, within the meaning of this law. The question then arises, what kind of contracts are prohibited by this statute? You will notice the language is, 'whoever contracts to have or give to himself or another the option to sell or buy at a future time,'—an option to sell or buy at a future time. The courts have construed to some extent the meaning of this statute, and I will read from a case decided by the supreme court of this state the construction which is there given upon it: 'The evidence in this record is by no means conclusive that the contracts for grain made by defendants for plaintiff were unlawful. They

were made in the regular course of business, and, for anything that appears in this record, they could have been enforced in the courts. It is true, they were time contracts,—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is they were bona fide contracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith, for the future delivery of grain or any other commodity, are not prohibited by the common law, nor any statute of this state, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had; consequently the rights of the parties are not affected by it. What the law prohibits, and what is deemed detrimental to the public interests, is speculations in differences in market values, called, perhaps, in the peculiar language of the dealers, "puts" and "calls," which simply means a privilege to deliver or receive the grain or not, at the seller's or buyer's option. It is against such fictitious gambling transactions, we apprehend, the penalties of the law are leveled." The above extract is taken from the opinion of the supreme court of Illinois in *Wolcott v. Heath*, 78 Ill. 433. The circuit court then proceeded in its charge as follows: "Now, the question is, in the light of the testimony in this case, whether the contracts in question in this case were contracts to buy or sell at a future day, or whether they were simply absolute sales, in which the seller had the entire month,—the month specified,—in which to perform his contract. This court has found it necessary, on several occasions, to construe this statute, and has held, with the case which I have just read, that the statute is leveled against what are called 'puts' and 'calls,'—that is, the right or the privilege which a party may have to buy or sell of you at a future day, not an absolute agreement now to sell, but where one man pays another \$5 or \$10 for the privilege of delivering to him 1,000, 5,000, or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time,—a contract which cannot be enforced in terms, because it is wholly at the option of the party holding the option whether he will call for the grain or not. This is what is termed a 'gambling contract,' or a 'put' or 'call,' or 'an option to buy or sell at a future time,' within the meaning of the Illinois statute."

The bill of exceptions further says: "And the court further explained to the jury that

the 'option to buy or sell,' prohibited by section 130, c. 38, of the Revised Statutes, means a privilege which the buyer or seller may or may not exercise at his option, and that a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time, when the only option is as to the delivery within a certain time, such as within the whole of some month named, is not a gambling contract, within the meaning of this statute."

There were other instructions to the jury, the entire charge covering nearly seven printed pages of the record. The bill of exceptions states that the plaintiff excepted to all of the instructions given, and especially to those hereinbefore set forth.

The second case above named is a suit in equity, brought on July 24, 1883, in the circuit court of Cook county, Illinois, by the Bank of British North America, a corporation of Great Britain, against James B. White and George M. Barber. The bill alleges that the bank has on deposit, in its office at Chicago, Illinois, \$6,700, standing to the credit of Barber, the same having been deposited by him as security for certain trades or deals in wheat with members of the board of trade of Chicago, the money having been turned over to the plaintiff by the Merchants' Bank of Canada, to whose business at Chicago the plaintiff succeeded; that White claims that said money belongs to him, and claims that Barber, in depositing it, acted merely as the agent of him, White; that on April 2, 1883, White made a demand upon the plaintiff for the money, and forbade it to pay the money, or any part thereof, to any person, except upon the order of him, White; that White had commenced an action against the plaintiff to recover the money; and that Barber had demanded of the plaintiff that it should pay the money to him. The bill prays that the defendants may interplead and settle the controversy, and that the plaintiff may be allowed to pay the money into court. Both of the defendants appeared in the suit. White put in an answer setting up that the \$6,700 was part of a larger sum of money placed by him in the hands of Barber to be used by Barber as margins in gambling contracts which Barber was to make for him on the board of trade in Chicago; that Barber, in pursuance of such employment, and in April, May, and June, 1882, made certain gambling contracts with members of the board of trade, which contracts were ostensibly for the sale of certain quantities of wheat by Barber to such members, to be delivered at any time in July, 1882, at the option of the pretended purchaser, but such pretended contracts were a mere form and cover, and the real intention of all the parties was to settle them by a payment of the difference between the price for which the wheat was sold and the market price of the same when delivery thereof should be called; that Barber took \$6,700 of the money of White, so placed in his hands, and

deposited the same with the Merchants' Bank of Canada, as security for certain of such pretended contracts, being the same \$6,700 turned over to the plaintiff by the Merchants' Bank, and that, while the money was still in the possession of the plaintiff, and on April 2, 1882, White notified both the plaintiff and Barber not to pay the same to any one but White.

Barber also answered the bill, and in his answer made the following allegations: He was not the agent of White in depositing the \$6,700. As a commission merchant at Chicago, he made certain sales and purchases of grain and pork, for future delivery, at the instance and request of White, being, as between himself and those with whom he made the contracts, responsible for the performance of them on his part. A large number of such transactions occurred in May, June, July, August, September, and October, 1882. Barber was doing business on the board of trade of Chicago, of which he was a member, and White was living at Fort Wayne, in Indiana. The contracts were made with reference to the rules and regulations of the board of trade, and to the usages of business on that board; and by those rules, the persons with whom Barber made such contracts were authorized to demand margins and deposits, as security for the performance of the contracts by Barber, and in various instances such demands were made, and it became necessary for Barber to make deposits for margins or security with reference to the contracts. These rules provided that, on time contracts, purchasers should have the right to require of sellers, as security, 10 per cent. margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above that price; also that sellers should have the right to require, as security from buyers, 10 per cent. margins on the contract price of the property sold, and, in addition, any difference that might exist or occur between the estimated value of said property and the price of sale. The rules also provided that securities or margins should be deposited either with the treasurer of the board of trade, or with some bank authorized to receive the deposits. The rules also prescribed the form of certificate to be used by the bank, which form was adopted by the Merchants' Bank of Canada, and by the plaintiff. In accordance with those rules, the certificates showing the deposits were issued in duplicate in each case, one being marked "Original" and the other "Duplicate," and both being marked "Not negotiable or transferable." The certificates were not made with express reference to any particular contract, and the deposits were subject to be treated as security for the fulfillment of any contracts made between the parties to the respective certificates, during the time the deposit remained unpaid.

During May, 1882, Barber, at the instance and request of White, made contracts for the

sale and delivery by Barber to divers persons, members of such board of trade, of large quantities of No. 2 spring wheat, for delivery at seller's option during July, 1882, at certain prices specified in the various contracts, ranging from \$1.22½ per bushel to \$1.25½ per bushel, which wheat was to be delivered in lots of 5,000 bushels. White did not put Barber in funds to buy wheat for delivery according to the contracts. While Barber remained liable upon the contracts, he was from time to time called upon to deposit margins on account of the contracts, to secure their performance, and did, in accordance with the rules of the board of trade, and in compliance with his duties under the contracts, make deposits of money and procure certificates therefor from the Merchants' Bank of Canada. The answer then gives the particulars of 12 different certificates for such deposits on various contracts, amounting in the aggregate to \$6,700. The contracts for the delivery during July, 1882, of No. 2 spring wheat, were not performed by White. The moneys deposited as margins were furnished by Barber in large part from his own means, for the purpose of keeping the contracts open, as was desired by White. Barber also, in order to avoid loss by White, and to protect the interests of White, made, before the close of July, 1882, a tender of No. 2 red winter wheat under the contracts, which wheat was of greater intrinsic value, as Barber believed, than No. 2 spring wheat; but the tender was rejected by the purchasers, on the ground that the wheat tendered was not of the kind and grade contracted to be delivered, nor such as, under the rules of the board of trade, was necessary to be delivered. The parties with whom the contracts had been made, and who had the right to call for delivery, made large claims for damages against Barber, and insisted that the tender was irregular and insufficient; and White desired Barber to object to the payment of such claims, and to reduce the same, if he could. With this object in view, Barber, at the instance of White, filed a bill in chancery in the superior court of Cook county, on September 11, 1882, against the board of trade, seeking by the bill to impeach the regularity and fairness of an award or decision of a committee which had been appointed, under the rules of the board of trade, to determine the settlement price under contracts such as those which were so made by Barber and which committee had determined that such settlement price should be \$1.35 per bushel. The bill also sought to restrain the board of trade from enforcing such award or disciplining Barber on account of non-compliance therewith. An injunction was temporarily granted on the bill. The award made Barber liable to pay, as damages to the parties with whom he had made the contracts, the difference between the contract price and the settlement price of \$1.35 per bushel. The superior court of Cook county adjudged in the suit that Barber was not

entitled to any relief on account of any of the matters stated in the bill, and the injunction was dissolved on April 16, 1883. The bill was drawn up by counsel employed by White, White knowing that if the injunction should be dissolved Barber would be required to settle on the basis of the award of the committee. With reference to that basis, White drew from Barber, on October 30, 1882, \$987.50, as an excess of money, including profits, due to him from Barber after reserving enough to pay damages at that rate.

Prior to the bringing of the suit in chancery, it was the right of the parties with whom Barber had entered into the contracts to have the moneys which had been deposited as margin or security under the contracts paid over to them on the order of the president of the board of trade, they holding, respectively, duplicates of the certificates; and Barber, on making default as to the delivery, became amenable to discipline under the rules of the board of trade, for not complying with the terms of the contracts. One of those rules provided that, when any member of the association failed to comply promptly with the terms of any business contract or obligation, and failed to equitably and satisfactorily adjust and settle the same, he should, upon admission or proof of such delinquency before the board of directors, be by them suspended from all privileges of the association until all his outstanding obligations to members of the board of trade should be adjusted and settled. The parties who were entitled to delivery of the wheat under the contracts for delivery in July, 1882, were, by those rules, entitled to settlement with Barber at the average market price of the commodity on July 31, 1882, the day of the maturity of the contracts, and the damage or loss due to such purchasers by reason of the required settlement became thereupon immediately due and payable by Barber to such purchasers; but the payment was delayed because of difference of opinion as to the amount of damages, and in order to enable White to obtain, if possible, a reduction of them; and this was the object of the suit in chancery against the board of trade. It was also, under those rules, the right of such purchasers, after a failure for three business days succeeding the maturity of the contracts, to cause to be submitted to a select committee of three members of the board any dispute between Barber and such purchasers, with reference to any deposit of moneys applicable to the contracts; and the decision of a majority of the committee, reported to the president of the board, would have determined in what manner and to whom the deposit should be paid; and thereupon the president would have been authorized by the rules to make an order for the payment of the deposit in accordance with the decision of the committee, which order would have been a sufficient warrant to the bank by which the certificates were issued, to pay the money in accordance with the order;

but action before the board, as against Barber, was postponed because of the injunction, and the certificates of deposit for margin and security, so issued, having reference to such wheat contracts, were held over in view of the injunction. After its dissolution, the payment of the margins or security moneys represented by the certificates was subject to be enforced under the rules of the board of trade, and Barber was in danger of being suspended from the privileges of the board because of the non-settlement of the contracts. White had due notice of all the foregoing facts, but failed to protect Barber or to give him any guaranty for his protection. The liability to suspension from membership of the board of trade was one of great consequence to Barber in a monetary point of view, as well as with reference to his standing and reputation as a merchant, for such suspension would have operated as practically a forfeiture of his membership, so long as the contracts remain unsettled. The fee for membership was fixed by the rules of the board at \$10,000, and any permanent suspension of Barber from the membership of the board would have caused a loss to him of even more than \$10,000, because it would have interfered with his livelihood and business. He could not, consistently with his rights or duties as a member of the board, defer an adjustment or settlement of the contracts any longer than was necessary to determine what he would, under the rules of the board, be required to do in respect to such settlement.

In order to accommodate White as far as possible, Barber delayed making settlement until after complaint was made against him before the board, in pursuance of its rules; and he allowed the complaint to proceed to a hearing, at which he attempted to make defense as to one of the contracts, setting up, among other matters, such tender of No. 2 red winter wheat; but the board ruled against him, and was about to direct his suspension from membership unless he made settlement. Thereupon, on the twenty-fourth of April, 1883, he settled such of the contracts as were then outstanding, making such settlement in accordance with the rules of the board, and on his making it the deposits for margins and security pertaining to the contracts were liberated, and on the return to the bank of the original margin certificates, so issued by the Merchants' Bank of Canada, the certificates being indorsed to the bank, it gave to Barber credit for the moneys on his account as a depositor in the bank. White caused Barber to make the contracts, and to become bound for their performance, and made it necessary for Barber to put up margins and security, and thus placed it out of the power of Barber to control such margins and security in any other way than according to the rules of the board of trade, and also so involved Barber, in causing him to become amenable to discipline by or suspension from the board of trade, that White could not legal-

ly or equitably revoke the authority of Barber to make settlement of the contracts or pay over the moneys when it became necessary to settle the contracts. The contracts were legal, and the provisions of the rules of the board of trade applicable thereto were binding upon Barber, and were necessary and proper to be considered with reference to his duties and rights, as between himself and the other contracting parties, and as between himself and White.

Barber avers that it was his right to pay damages or differences on default under the contracts, when such damages became due, according to the rules of the board of trade; that such right inured to him by direct authority from White, when the contracts were made at the instance of White, and the moneys were paid or advanced to Barber; and that thereafter there was no time when White had any right or authority to revoke the power to pay over the moneys, when, in the course of trade, or in accordance with the rules of the board of trade, it became necessary to pay them over, in making settlement of the contracts on which White defaulted, and which it became necessary for Barber to adjust, because he had become a party thereto at the instance of White; that the contracts in question were but a small part of the dealings which were had by White through Barber, as his commission merchant, with various members of the board of trade; that in many of those dealings, which were carried on contemporaneously with the dealings in question, there was profit to White, and White received from Barber, on account thereof, large sums of money, representing such profits; and that it would be inequitable for White to claim that he should be relieved at the expense of Barber from the effects of the contracts for the delivery of No. 2 spring wheat in July, 1882, which remained open at the close of that month because of the non-fulfillment thereof on the part of White, while White had received profits from other contracts of a similar character, made for him by Barber, which White chose to have settled and closed, when the same resulted in profits which were to be paid to White by Barber.

Replications were put in to these two answers, and, in January, 1884, the suit was removed by Barber into the circuit court of the United States for the Northern district of Illinois. Afterwards, it was stipulated that the money might remain in the hands of the bank until the final disposition of the cause, subject to like order by the court, as if the money were paid into the registry of the court, and an order was made dismissing the bank from the litigation, as well in the suit at law commenced against it by White, as in the interpleader suit.

By a further stipulation, made in May, 1884, the testimony taken in the suit at law before mentioned, of White against Barber, to recover the \$11,412.50, at the trial which took place in February, 1884, was used and introduced by the party taking the same, as his testimony on the trial of the suit in equity. Such testimony

consisted of the detailed examination of the witnesses examined on the trial of the suit at law, and of documentary testimony, the substance of which examinations and documentary testimony is given in the bill of exceptions in the suit at law, and is hereinbefore recited. To this were added, in the suit in equity, the further depositions of White and Barber, taken therein in May, 1884. In these supplementary depositions, each party goes over with greater particularity the matters previously testified to by him, as set forth in the bill of exceptions; but nothing is substantially added throwing light upon the merits of the dispute. By the same stipulation, there was put in, as part of the testimony on behalf of Barber, a copy of the proceedings and judgment in the suit at law above mentioned, brought by White against Barber to recover the \$11,412.50. In May, 1884, a final decree was made in the suit in equity, adjudging that Barber was entitled to the \$6,700, and ordering that it be paid to him. From that decree White has appealed to this court.

L. M. Ninde, for appellant. Thomas Dent, for appellee.

Mr. Justice BLATCHFORD, after stating the facts as above, delivered the opinion of the court.

The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the statute of Illinois (section 130, c. 38, Rev. St.) was determined by the supreme court of Illinois in *Wolcott v. Heath*, 78 Ill. 433, in the passage from the opinion in that case quoted by the circuit court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat, deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were bona fide contracts for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all events, with the option only to deliver it at any time before the close of business on the last day of July, 1882. That the contracts made by Barber were of that character, and were not such gambling contracts as the statute denounces, must be held to have been found by the jury under the portions of the charge specially excepted to, and under other portions of the charge contained in the record. The plaintiff did not pray for any instructions to be given to the jury, nor did he present to the court any propositions of law which he maintained the court should lay before the jury as guides to a proper solution of the questions in controversy. The general exception to the whole of the charge cannot be regarded, as it is a violation of rule 4 of this court.

In its charge to the jury, the circuit court explained fully to them the theory of White,—that the dealings on account of which Barber paid out the moneys in question were, as between White and Barber, gambling or wager contracts, and, therefore, illegal. It presented

fairly to them a statement of the testimony on both sides of that question, as set forth in the bill of exceptions. It also submitted to them the question whether, in view of the testimony, the contracts in question were contracts to buy or sell at a future day, or whether they were absolute sales, in which the seller had the entire month of July, 1882, in which to perform his contracts; and it instructed them that if they should find that the dealings by the defendant for the plaintiff were options to buy or sell at a future day, their verdict should be for the plaintiff; but that if, on the contrary, they should find that such dealings were contracts by which the grain was to be absolutely delivered during the month of July, 1882, the only option being the time when, during the month, the delivery should be made, their verdict should be for the defendant. This charge was very favorable to the plaintiff, for it necessarily involved an affirmation of the propositions that the plaintiff had a right to revoke his action in advising the tender of the No. 2 red winter wheat in fulfillment of the contracts, and had a right to revoke his express or implied assent to the appointment of the committee, under the rules of the board of trade, to determine what was a fair settling price for the wheat on the thirty-first of July, 1882, and had a right to recall his connection with the chancery suit brought by Barber against the board of trade, in which the validity of the contracts was recognized, and had a right to ignore the fact that he had placed Barber in the position in which, at the time of the giving of the notice of April 2, 1883, by White to Barber, Barber was not at liberty to refuse payment of the damages arising out of the non-fulfillment of the contracts, but was in danger of being expelled from the board of trade, if he persisted in such refusal.

The jury must have found, on the testimony, that the contracts made by Barber for the plaintiff at the board of trade were valid contracts, and that Barber was liable on them to either deliver the grain or pay the damages in case he failed to deliver, because the court charged the jury that, if the proof satisfied them that, by the contracts, Barber was liable to either deliver the grain or pay the damages, then the contracts were not gambling contracts, and they should find for the defendant. We find no error in the record in the suit at law, and the judgment is affirmed.

In the suit in equity, the contention on the part of White is that the contracts and transactions between Barber and himself were wagering contracts, and, therefore, void, and that the \$6,700 was subject to the demand of White, if such contracts were void. It is urged on the part of White that the wheat was sold by Barber for him without any intention on the part of either of them that there should be any delivery thereof, but with the intention that the transactions should be settled by the payment of the differences between the prices at which the wheat was sold and its prices at the times stipulated for its delivery. White testifies that such was his understanding, communicated to

Barber before Barber made the contracts of sale. Barber testifies that he has no recollection of anything of the kind. The evidence as to what White did in connection with the transactions is inconsistent with White's version, and it clearly appears that Barber had no such understanding.

The defense set up in the answer of Barber is proved to every substantial intent, and the facts therein set forth constitute a valid bar to the suit of White. The evidence shows that White, in advance, required that Barber should trade with parties whom he knew to be responsible; that in each case he gave special directions to Barber to buy or to sell, as the case might be, and left it to Barber to put the contract in form, these directions being generally given by telegrams from White at Fort Wayne to Barber at Chicago; that it was understood between them that Barber should buy or sell at the Chicago board of trade; that Barber, in all cases, obeyed the orders of White; that White controlled the trades which Barber made; that, unless the margin was exhausted, Barber was not to close out White's trades until White directed him to do so; that it was understood that Barber was to observe the rules of the board of trade; that White knew that Barber, as a member of such board, making such contracts on the board for White, would be obliged to observe those rules; that White directed Barber when to cover and when to close trades, and that Barber observed his orders; that White acted on his own judgment in making the sales of wheat for delivery in July, 1882; that, when the contracts for those sales had matured, White approved of the tender being made of No. 2 red winter wheat; that subsequently, on August 5, 1882, White telegraphed to Barber from Fort Wayne, directing him not to cancel the July trades, and saying that White's attorneys at Fort Wayne believed that such tender was good, and could be enforced; and that, on the fifteenth of August, 1882, White, in a letter to Barber, stated that his attorney at Fort Wayne had examined the subject of the July deals in connection with the rules of the board of trade, and had concluded that the delivery which Barber had tendered was good, and was "binding on the buyer, and that we can collect the difference in court." It also appears that Barber was unwilling to default on the contracts lest it should injure his reputation on the board of trade, and that he defaulted on them because White insisted that he should do so. White knew of the rule of the board of trade under which a committee could be appointed to determine what was a fair price for property to be delivered, and was willing to leave it to such committee. After the committee had fixed the price at \$1.35 per bushel, White was advised of this action, and determined that legal proceedings should be taken to set aside the award of the committee. It was in pursuance of the wish of White that the chancery suit was brought by Barber against the board of trade, to enjoin all action under such award. In that suit, an injunction was

obtained to restrain such action, which injunction remained in force until the determination by the supreme court of Illinois of a suit brought by one Wright against the board of trade (15 Chi. Leg. N. 239), it having been stipulated that the suit of Barber against the board of trade should abide the final result of the Wright suit. The latter suit was decided in favor of the board of trade. After all this had occurred, White determined to repudiate his obligations to Barber, and, on the second of April, 1883, he served on Barber the written notice, claiming that the contracts for the sale of the wheat were illegal and void, and forbidding Barber to pay over any part of the \$11,412.50 to any one but White, and demanding the immediate payment of it to him. On the twentieth of April, 1883, Barber, having been notified of complaints made against him before the board of trade, under its rules, which provided for the hearing of complaints and for suspension or expulsion in case of noncompliance with contracts, notified White in writing of these facts, and asked White if he could protect him (Barber) in any way. Not receiving such protection, Barber, on the twenty-fourth of April, 1883, paid out the moneys necessary to satisfy the damages on the contracts, and thereby relieved himself from being suspended from membership in the board of trade. He had no alternative but to pay the money or lose his business, and also lose a sum of money, in the value of his membership in the board of trade, equal to, if not greater than, the amount in controversy in this suit. He had acted strictly according to the instructions he had received from White. White had left the money in his hands for the express purpose of paying such damages as the committee of the board of trade should find to be due. Barber retained the money in order to allow White to obtain some benefit, if he could, from the suit in chancery brought by Barber. By that suit, and by the suit of Wright, all legal means were exhausted, leaving the rights of the purchasers under the contracts of sale to be enforced according to the rules of the board of trade under which they were made. The payment of the money by Barber in satisfaction of those damages was, under the circumstances, demanded by every principle of law and of equity, and no right was left in White to claim the \$6,700.

White had no right to forbid the payment of the money by Barber, or to recall it from its destination. The money is to be regarded as having been, for all practical purposes, irrevocably set apart by both White and Barber for the payment of such damages, prior to the giving of the notice by White to Barber on the second of April, 1883. White had caused Barber to make the contracts, and to become bound for their performance, and had made it necessary that Barber should put up the margins and security, and had thus placed it out of the power of Barber to control the margins and security in any other way than according to the rules of the board of trade, in subordina-

tion to which White as well as Barber had acted throughout. It was obedience to the orders of White which had made Barber subject to suspension or expulsion by the board of trade. The \$6,700 had been put up by Barber as margins, under the rules of the board of trade, prior to the giving of the notice of April 2, 1883, and thus had been before that time devoted by White as well as Barber to the purpose of paying the damages under the rules of the board of trade. For the reasons thus stated, we are of opinion that the claim of White sought to be enforced in this suit in equity cannot be allowed.

A claim is made on the part of White that he can recover this money under the provisions of section 132, c. 38, Rev. St. Ill. (Hurd, Rev. St. Ed. 1883, p. 394; Ed. 1885, p. 405). That section provides that "any person who shall at any time, * * * by any wager or bet upon any * * * unknown or contingent event whatever, lose to any person so * * * betting any sum of money, * * * amounting in the whole to the sum of \$10, and shall pay * * * the same or any part thereof, the person so losing and paying * * * the same shall be at liberty to sue for and recover the money * * * so lost and paid, * * * or any part thereof, * * * by action of debt, * * * from the winner thereof, with costs, in any court of competent jurisdiction." It is a sufficient answer to this claim to say that Barber was not the "winner" of any money from White.

There is a further view applicable to this case, arising out of the decision of this court in *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. 557. In that case, Higgins, the broker of McCrea, sued him to recover moneys which Higgins had paid for the purchase, at the Chicago board of trade, of pork and lard, on the instruction of McCrea, in May, 1883, deliverable in August, 1883, on such day as the seller might elect. In his answer, McCrea set up that he had engaged with the plaintiff in gambling transactions, and that the contracts which the plaintiff had made were not contracts for the actual delivery of any merchandise, but were pretended purchases and mere options, and that it was the understanding of all the parties to the transactions that no merchandise should be delivered on the contracts, but that the same should be settled upon the differences between the contract prices and the market prices. On this basis, McCrea claimed, by way of counter-claim, to recover judgment against the plaintiff for the sum of nearly \$20,000, which he alleged he had paid to the plaintiff to carry on such gambling transactions and to purchase option contracts. The plaintiff denied the version thus given by the defendant of the transactions. The circuit court had instructed the jury that the defendant was entitled to recover upon his counter-claim, and he had a judgment accordingly. This court held that the case of the defendant, as stated by himself in his answer and counter-claim, was that the money was advanced by him to carry on a gambling transaction; that with his

concurrence the money so advanced was used in such gambling transaction; and that, by the statute of Illinois, where the contracts were made, they were treated as gambling contracts, and were void; that the counter-claim thus stated was supported by the testimony of the defendant given on the trial; that there was no statute of Illinois to authorize the recovery of money paid on such contracts; and that no recovery could be had by the defendant. This court said in its opinion: "We do not see on

what ground a party who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate."

The decree of the circuit court is affirmed.

DOWS et al. v. GLASPEL.
(60 N. W. 60, 4 N. D. 251.)

Supreme Court of North Dakota. Aug. 3, 1894.

Appeal from district court, Stutsman county; Roderick Rose, Judge.

Action by David Dows, Jr., and George B. Cooksey, copartners as David Dows, Jr., & Co., against Samuel L. Gaspel, to recover commissions and advances made by plaintiffs on account of the sale and purchase of wheat by them as defendant's agents, in which defendant set up a counterclaim. From a judgment for defendant in the main case, and against defendant on his counterclaim, and also disallowing costs to defendant, both parties appeal. Modified as to costs, and affirmed.

Ball & Watson and White & Hewitt, for plaintiffs. E. W. Camp and S. L. Gaspel, for defendant.

CORLISS, J. The plaintiffs are seeking to recover judgment against defendant for their commissions and for advances made by them on account of the sale and purchase of wheat by them as agents for defendant. Thus far they have been unsuccessful. The case was tried before the court, and judgment was rendered in favor of the defendant. The findings of the court amply sustain the judgment. But it is here urged that the evidence does not justify certain of the findings. The defense relied on was that the transactions in which the plaintiffs claim to have paid out moneys for the defendant were mere wagers on the price of wheat, and that the plaintiffs knew that the sole purpose of defendant was to gamble in wheat options, and not to enter into bona fide wheat contracts in which wheat was to be delivered to or by him thereunder. The plaintiffs were commission merchants in the city of Duluth, Minn., and were members of the Duluth Board of Trade. The defendant was and is an attorney in full practice, residing and carrying on his professional business at Jamestown, N. D. In September, 1885, the defendant commenced shipping wheat to plaintiffs, to be sold by them for him in Duluth. These shipments continued for a time, and finally, on October 30, 1885, the defendant sent to the plaintiffs the following telegram: "Buy ten May, ninety-eight or better, account of myself, and same account of J. E. Shoenberg." It is undisputed that this telegram was an order for the plaintiffs, as agents of defendant, to buy for him on the Duluth Board of Trade 10,000 bushels of wheat to be delivered in May, 1886, at not exceeding 98 cents a bushel. Thereafter defendant continued to send similar orders to the plaintiffs until the following June, when the plaintiffs closed him out, he having failed to keep good his margins. From time to time the various purchases made by plaintiffs for defendant were closed out on his orders. They were invariably closed out by the plaintiffs selling, under his directions, for future

delivery, the same amount of wheat he had purchased. The first transactions resulted in a small profit to defendant, but, after purchasing 50,000 bushels of wheat for May delivery, the price fell rapidly, and when this purchase was closed out the following June the loss resulting from the transaction over and above moneys received by plaintiffs from defendant for margins was over \$7,000. Plaintiffs claim that they were compelled to pay out on behalf of defendant in these transactions all the moneys for which they sue except their commissions, and they also seek to recover such commissions in addition to their alleged advances. The trial court found that all the transactions stated in the complaint as purchases and sales of wheat (except the sales of actual wheat shipped to plaintiffs by defendant for sale) were wagering transactions, in which no wheat was to be delivered or received by the parties thereto, and that the defendant employed the plaintiffs to make purchases and sales of wheat for future delivery in the city of Duluth, Minn., with the mutual understanding and agreement that no wheat was to be delivered or received by either party, and that such transactions were to be mere wagers upon the rise and fall of the market price at Duluth; that all such purchases and sales were made pursuant to such mutual understanding; that all of such transactions were to be settled at a future time by the payment of differences, viz. the difference between the contract or purchase price and the market price on the day of settlement, and that neither party to the transaction should be required to deliver or receive any wheat; that all of such transactions involved simply gains or losses dependent upon the future rise or fall of the market price, and that no wheat was demanded, tendered, delivered, or received in any of the transactions. In the first place, we hold that the rights of the parties to this action are to be governed by the laws of Minnesota. The agents resided there, and the purchases and sales were all made there, and the defendant employed the plaintiffs as his agents for the express purpose of having such sales and purchases made there. No proof as to the laws of Minnesota, so far as this question is concerned, was made. Nor is there any finding on this point. We must, therefore, presume that the common law prevails there with respect to the questions of law which this case presents. We recognize the legal right of every one to speculate in every commodity which he does not own, and for which, as a commodity, he has no use. He may enter into a contract to buy or sell anything of value for the sole purpose of speculating,—with no other object in view than that of making profit out of the transaction; but he must in good faith bind himself to deliver or receive the thing sold or purchased. It is true that the undisclosed purpose of one of the parties to a contract not to deliver or receive the article contracted for will not

affect the other party, who, relying on a contract calling for delivery, intends in good faith that the contract shall be carried out in all of its particulars. But when neither party intends that the property shall be delivered, where they both intend that the difference between the purchase price and the market value at the time specified shall be paid to the one who wins, then the transaction is a mere wager, and is void at common law in this country. See cases cited in note to *Crawford v. Spencer*, 1 Am. St. Rep. at page 759, 4 S. W. 713, and 92 Mo. 498. We must, therefore, presume that such a contract would be void in Minnesota.

This action, however, is not upon the several contracts of purchase and sale. It is brought to recover the advances and commissions of the agents who negotiated them. But the rule which prevents recovery upon a mere wagering contract applies with equal force to the agent who brings the parties together with knowledge that their purpose is not to enter into a legitimate agreement, but to gamble over the ever-shifting price of the commodity to which their dealings relate. In this case it is expressly found that the plaintiffs knew that the purpose of the defendant was to gamble, and that he employed them in furtherance of that purpose, and that all the transactions in which the plaintiffs acted as agents for defendant were mere wagers on the price of wheat. That the agent cannot, under such circumstances, recover his commissions, or the advances made by him on behalf of his principal, is well settled. Having knowingly participated in an illegal transaction, the law will leave him without remedy in case of loss. *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Phelps v. Holderness*, (Ark.) 19 S. W. 921; *Embrey v. Jemison*, 131 U. S. 336-345, 9 Sup. Ct. 776. The findings are broad enough to embrace the fact that the persons with whom plaintiffs dealt in making purchases and sales for defendant had no thought of making or calling for delivery of the wheat, and we feel clear that the evidence fully sustains such a finding. But we are not compelled to rest our decision on this branch of the case upon this finding and the sufficiency of the evidence to sustain it. The intention of the other party to these transactions is immaterial. It is sufficient if the defendant's purpose was to gamble, and the plaintiffs knew of it when they went upon the board of trade to make such purchases or sales for the defendant. Being employed by the defendant to secure for him upon the board of trade mere wagers upon the price of wheat, they would have no authority to enter into legal contracts on his behalf; and, if they should do so, and sustain losses, they could not recover such losses from him, because their acts resulting in such losses would be unauthorized. Moreover, having been instructed to make mere wagers on behalf of defendant, the law will presume, as

against the agents—in a case in which the other party to the transaction is not interested, that they obeyed such instructions, and that, therefore, they did not enter into legal contracts with others, binding the parties to deliver and receive the wheat agreed to be bought. There is no direct evidence as to the intention of the other parties to the several purchases and sales. The transactions on both sides appear to have been precisely alike, and it is a fair inference that the transactions which defendant intended should be mere wagers, which the plaintiffs, with knowledge of such intention, entered into on behalf of defendant, and which were in the form in which gambling in all kinds of commodities is carried on, were in fact intended by all parties thereto—principals and agents on both sides—to be mere bets with reference to the future price of wheat. That the intention of the other party to the contract is immaterial when the agent who is seeking to recover commissions and advances knows of the purpose of his principal to gamble, and loses the money for which he seeks judgment in furthering that purpose, is a well-established doctrine. *Phelps v. Holderness*, (Ark.) 19 S. W. 921; *McCormick v. Nichols*, 19 Ill. App. 334, 337; *Beveridge v. Hewitt*, 8 Ill. App. 467, 482, 483; *Miles v. Andrews*, 49 Ill. App. 155, 163, 164; *Coffman v. Young*, 20 Ill. App. 82. In *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, the defendant in an action brought upon notes given in settlement of a claim of his agents for losses growing out of the purchase and sale of cotton for defendant set up as a defense that neither he nor his agents intended that actual cotton should ever be delivered. There was no averment that the other party to the transaction entertained the same purpose in making the contracts out of which the losses grew. And yet the court held that the answer stated a good defense. See pages 338, 349, 131 U. S., and page 776, 9 Sup. Ct.

We come now to the question of the evidence to support the findings that the plaintiffs knew that the purpose of the defendant was to gamble, and that the losses for which they sue were suffered by them in furthering such illegal purpose. At the outset, we conclude that plaintiffs are right in the contention that the burden is on the defendant to establish by competent evidence the illegality of these transactions, and the participation of the plaintiffs in the unlawful purpose of the defendant. We might also safely assume that the sales and purchases made by plaintiffs on behalf of defendant were in form legal contracts, calling for the delivery of wheat specified therein. It is significant, however, that, while the witnesses on behalf of plaintiffs testify to actual sales, they do not pretend to state the terms of the contracts, nor was any written contract of sale introduced in evidence. Without at least a written memorandum of these sales, they would not have been valid, and it is diffi-

cult to understand why these contracts were not reduced to writing if they were intended to embody the terms of a bona fide sale. It was the duty of the plaintiffs, as agents for defendant, to secure for him a contract he could enforce if they were making bona fide sales and purchases for him. The silence of the record in this respect is strong evidence that these alleged agreements were not in writing. Nay, there is positive evidence that they were not reduced to writing. One of the plaintiffs testified that formal contracts were not drawn up, but that there was always a full understanding as to the nature of the transactions. But, however perfect the likeness of a gambling transaction to the form and features of a legitimate sale, the legality of the dealings between the parties must rest ultimately upon their honest intention. Illegality is seldom guilty of the consummate folly of flaunting its defiance of law in the face of public sentiment—of furnishing itself the evidence of its violation of law. To escape the penalties of breaking the law, it will always put on the "suits and trappings" of honest transactions. Mere wagering contracts invariably wear the garb of bona fide sales. This is common knowledge. Myriads of gambling operations are daily arranged by two interested brokers, who fatten on the folly of their dupes, in the decent and decorous habiliments of lawful business transactions. The naïveté of a tribunal which in such cases should unquestioningly take the semblance for the substance would, indeed, be pitiable, if it did not excite derision and contempt. The courts have always sought to pierce the disguise, and ascertain the real intention of the parties. *Whitesides v. Hunt*, 97 Ind. 191; *Melchert v. Telegraph Co.*, 11 Fed. 193; *Edwards v. Hoedlinghoff*, 38 Fed. 639; *Embrey v. Jemison*, 131 U. S. 336, 344, 9 Sup. Ct. 776; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 169; *Mohr v. Miesen* (Minn.) 49 N. W. 862. Said the court in *Melchert v. Telegraph Co.*, 11 Fed. 193: "In seeking to ascertain the intentions of parties to such transactions as the one under consideration, it is evident that it will not do to place any great stress upon the mere terms of the contract, or upon their own declarations, whether under oath or not. Parties under such contracts will always seek to give them the form and semblance of legality, and all our experience admonishes us to receive with extreme caution, if not absolute distrust, what parties charged with transactions apparently illegal say respecting the innocency of their own intentions." In *Edwards v. Hoedlinghoff*, 38 Fed. 639, Judge Sage says: "No matter what the form of the contract, no matter how many colorings of reality and genuine dealing are thrown about the transaction, if, piercing all these disguises, the court or jury see that all these forms are mere shams, and that there was in fact no actual dealing in the article itself, but that forms were adopted as a mere semblance to

deceive and evade the law, it is the duty of the court and jury to tear away the disguise, and treat the transaction as it is." In *Embrey v. Jemison*, 131 U. S. 344, 9 Sup. Ct. 776, the court said of the transaction there before it: "If this be not a wagering contract under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded." What, then, were the intentions of defendant? Was his purpose merely to gamble? Did plaintiffs have knowledge of such purpose? Did they aid him in carrying it out? Were these losses incurred by them in so doing? The evidence fully sustains the finding of the court with respect to the intention of the defendant. He testified that his sole object was to make wagers on the price of wheat. The character of the transactions, and the evidence of all the parties, fully corroborate his statement.

The only remaining question is whether the plaintiffs were aware of defendant's purpose when they went upon the board of trade to make for him the several purchases and sales out of which these losses grew. If they did, it is an inevitable inference that they participated in his gambling project, and actually aided him therein. We are clear that the circumstances surrounding these transactions fully sustain the finding of such knowledge and participation. The order to purchase wheat came to plaintiffs in the form in which mere orders to gamble in the price of wheat are sent by speculators to brokers. It is a well-known fact that a large percentage of such transactions are only wagering operations. No one knew this better than the plaintiffs when they received the defendant's different orders to buy and sell. At no time during all these transactions was there a suggestion from either plaintiffs or defendant that a bushel of this wheat was to be delivered to or by the defendant. He was never informed of the names of the different brokers of whom these purchases or to whom these sales were made. He never knew who were the principals back of such brokers with whom he had entered into contracts calling for the delivery, on plaintiffs' theory, of thousands of bushels of wheat. His indifference to this matter of delivery all through these transactions was certainly suggestive to plaintiffs, who were familiar with such indifference, and the reasons for it, through having witnessed it in a multitude of similar transactions. From the very beginning the defendant pursued the course of closing out these purchases long before the day of delivery had arrived; in some cases ordering sold, within a few days after the purchase, all or a portion of the wheat purchased for May delivery. What did this indicate to the mind of the plaintiffs, if it did not tend to show them that defendant was merely gambling in options? The de-

defendant was a lawyer, as plaintiffs well knew. Why was he buying thousands of bushels of wheat for future delivery, and then closing out the transaction in a short time? It is also singular that the defendant should take no pains to inquire as to the responsibility of the persons of whom the plaintiffs had purchased wheat for him for May delivery, if the transactions were ordinary business transactions, and not the usual wagering deals upon the board of trade. The purchaser in an honest business sale naturally wishes to know something of the pecuniary responsibility and of the character of the man who has agreed to deliver property to him at a certain time for a specified price. If the vendor will not perform his contract, and cannot be made to pay damages for breach of it, the contract is of no value to the purchaser. How could the plaintiffs expect that the defendant would regard a bona fide purchase by him closed out, and himself released from all further liability on the contract by ordering a new contract to be made with another person,—a contract of sale,—thus increasing, rather than extinguishing, his liability, if the two transactions were bona fide sales? The natural mode of wiping out an obligation is to reach the party who holds it, and agree with him as to the terms on which he will release the other party who desires to be discharged. Yet the plaintiffs knew that the defendant was willing to pursue a widely different course, and close out his purchase at a profit, by obligating himself to sell more wheat to another without securing release from the contract of purchase which he desired to wipe out. It is only on the theory that these transactions were understood by the defendant to be mere wagers on the price of wheat that they can be accounted for when we consider the object of the defendant in entering into them,—i. e. to close out his pretended purchases at a profit. Where the purchase and the sale are legitimate transactions, one cannot count in advance on a profit, although he has contracted to settle at a higher price than he has agreed to pay for the same commodity. The one who has agreed to pay him the higher price may refuse to perform the contract, and may be without financial responsibility. Indeed, the dealer may, in such case, find, when the time for delivery arrives, that he has actually lost, as the market price of the commodity may then be lower than the price he has agreed to pay for it, and the irresponsible purchaser in the other contract may refuse to carry out his agreement. Defendant's belief, which his communications and conduct made manifest to the plaintiffs, that both transactions, the purchase and the sale, were at an end, and that he had won or lost, as the case might be, must have furnished to the plaintiffs very cogent evidence that defendant did not regard these dealings as legitimate purchases and sales, but only in the

light of wagers on the market price of wheat. Plaintiffs knew that defendant had no use for the wheat he ordered purchased, and they took no pains to ascertain whether he had sufficient financial ability to pay for the large purchases he made from time to time on the theory that he intended to receive and pay for the wheat. Defendant never furnished any money to make the different purchases with, nor was he ever called on by the plaintiffs to furnish them with money for that purpose. He merely sent them funds from time to time to keep good his margins as he bought and then sold. It is true that plaintiffs insist that the sales were genuine, and that they did not know of defendant's purpose to gamble. But courts are not bound by the testimony of interested parties, but may look to the surrounding circumstances, to ascertain the true character of the transactions. Some of the correspondence between the parties furnishes strong evidence that plaintiffs knew that defendant's sole purpose was to gamble. On February 5, 1886, defendant wrote to plaintiffs a letter, in which the following sentence appears: "I now see that you have my actual wheat account mixed with my option account." In this letter he distinctly notifies plaintiffs that his option account is not an account involving the purchase and sale of "actual wheat." The two expressions are used to distinguish the two classes of transactions; one relates to actual wheat, the other not. He speaks of the account of the fictitious wheat transactions as the "option account." Fictitious wheat transactions they must be if they do not relate to actual wheat. On the 15th day of December, 1885, defendant wrote plaintiffs as follows: "When you can buy 20 May at 95 cents, take it. I have 5,000 wheat in granary. Do you handle wheat in Minneapolis? By the way, I want you to handle options for me at one-eighth." On the 4th of December, 1885, plaintiffs wrote to defendant a letter, in which they said: "Our market opened at 98½ for May, developed strength throughout the day, and closed at one dollar bid. We are very glad you had the pluck to hold on, and believe that wheat is a purchase on all good breaks. Still, if you get a fair profit, we would advise you to close it out, taking chances of getting it back at cheaper figures. We have had a very good advance, and any further bulge will doubtless be followed by some reaction." In this letter plaintiffs themselves advise this man, who, according to their theory, had bought actual wheat, to close it out, and buy it back cheaper. In other words, they plainly tell him that the delivery of the wheat is not what any one is thinking of. They advise him to close up the old bet as soon as he can secure a fair profit, and then make another bet when wheat has again fallen in price.

Our attention has been called to one of the rules of the Duluth Board of Trade, and to

the testimony that it was in force when these transactions were had, and that they were entered into by plaintiffs with reference to such rule. It declares as follows: "In all cases of sale of produce, the party or parties selling shall deliver the property sold at the time specified, unless the purchaser shall consent to accept or pay the difference in cash, when so requested to do by the seller. In all cases, however, the buyer shall have the right to demand the property, if he so elects." This rule confirms our views that these transactions were known by plaintiffs to be mere wagering deals. In this very rule the purchaser is given the option to accept or pay the difference in price when the seller so requests him to do. In other words, the rule provides that the parties may agree to do what every layman knows they can agree to do without any such rule. Why mention this right to agree to settle by paying differences when it is a right which exists independently of any rule? The reason is obvious, when the almost universal practice is considered. When brokers, by their rules, inform their speculating customers that no delivery is necessary if the parties agree to dispense with it, and this is followed by the almost uniform practice of settling by paying differences, we are constrained to believe that no delivery was intended from the very outset of any of these transactions, and that the brokers were well aware of it. With the obvious purpose of covering up the gambling character of these operations, they establish a rule that there shall be a delivery, unless both parties agree to dispense with it; knowing that both parties will always so agree. It is significant, too, that this rule applies only to actual sales. This still leaves the question open whether the parties intended an actual sale or were merely wagering on the price of the commodity ostensibly bought and sold. This rule does not apply at all if the deal is a mere wager. It does not declare that every transaction on the board of trade shall be a bona fide sale, but merely provides that, if it is a sale, the parties must deliver, unless they agree to settle by paying differences. Moreover, it does not appear when the consent may be given to settle in this way,—whether after the transaction is consummated, or at the time the deal is made. If at the time the deal is made, then this understanding of itself renders the operation a mere wager, for it is an understanding from the very beginning that there shall be no delivery. But the real purpose of the parties to gamble, when it is once found to exist, cannot successfully escape the condemnation of the law, whether the false appearance of an honest sale is put on by rules of boards of trade or by the devices of executing legal contracts in form. It has been frequently held that circumstances similar to those which surround these transactions amply sustain a finding that the dealings between the parties were mere wagers, when the circumstances

were no more convincing than in this case. *Mohr v. Miesen* (Minn.) 49 N. W. 862; *Phelps v. Holderness* (Ark.) 19 S. W. 921; *Cobb v. Prell*, 15 Fed. 774; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713; *Miles v. Andrews*, 40 Ill. App. 155; *Beveridge v. Hewitt*, 8 Ill. App. 482; *Colderwood v. McCrea*, 11 Ill. App. 546; *Watte v. Wickersham* (Neb.) 43 N. W. 259; *Sprague v. Warren* (Neb.) 41 N. W. 1113. We would expect the plaintiffs to give to these gambling transactions the appearance of honest sales, and to insist in their testimony that they were what they appeared to be. But, although the hands may seem to be the hands of Esau, the voice is unmistakably the voice of Jacob.

One of the errors assigned relates to the admission of the testimony of the defendant with reference to statements made to him by one Nichols, the agent of the plaintiffs, touching the character of the business he urged defendant to carry on with plaintiffs. In substance, the defendant testified that this agent informed him that these transactions which the agent induced him to enter into with plaintiffs would be mere wagers on the price of wheat; that in them no wheat would be delivered by either party to the different deals. Plaintiffs here contend that the reception of this evidence was error, because the agent, Nichols, had no authority to represent them, except in the matter of securing shipments of actual wheat, to be sold by plaintiffs for the shippers, as their agents in Duluth. There is no attempt in this case to enforce against plaintiffs any liability because of any contract made by this agent on their behalf; but it is claimed that the case shows that Nichols had no authority to act for them except in legitimate transactions, and that, therefore, any knowledge he may have acquired that the defendant intended to gamble would not affect them; and hence it is contended that it was prejudicial error

to receive this evidence, as the court may have considered it as evidence of knowledge on the part of plaintiffs of defendant's illegal purpose. But this evidence was admissible for the purpose of strengthening defendant's testimony that his sole purpose was to gamble; to show that he had ground for believing that he was only gambling, and that he so understood the subsequent transactions. Its value for this purpose would not depend upon the authority of the agent, but upon the mere fact that such agent had put into defendant's mind the thought of engaging in such gambling transactions. As it was admissible for this purpose, it was not error to receive it. We cannot assume that the court considered it as proving another fact which it had no legal tendency to prove. On the contrary, it is a fair presumption that the court, after having lawfully received the evidence to establish one fact, regarded it as incompetent to prove another fact, which could not legally be established in that way. Especially must this be the presumption

when it appears, as is done in this case, that the latter fact is almost conclusively established by other evidence.

We come now to the second branch of the case. Defendant set forth in his answer as a counterclaim that he had paid to plaintiffs certain sums of money as margins in these gambling transactions, and asked that judgment for this money be rendered against the plaintiffs in his favor. It is undisputed that defendant did in fact pay to the plaintiffs as margins the sum of \$4,259.68. The right to recover back this money, it is conceded by defendant's counsel, rests upon the Minnesota statute. It seems to be agreed between counsel for the plaintiffs and defendant that there is no common-law liability to refund such money, and that the rights of the parties are governed by the laws of Minnesota, where the transactions were carried on, and not by the laws of this state. The statute of Minnesota relied on by defendant provides that: "Whoever by playing at cards, dice or other game, or by betting on the hands or sides of such as are gambling, loses to any person so playing or betting any sums of money or any goods whatever and pays or delivers the same or any part thereof to the winner, the person so losing, and paying and delivering the same, may sue for and recover such money by a civil action before any court having competent jurisdiction." Gen. St. c. 99, § 13. Without attempting, in this opinion, an analysis of the statute, we are entirely free from doubt in our view that it does not relate to moneys lost in dealing in options. Under similar statutes the courts have uniformly held against the liability of

the person receiving the margins to refund them. *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687; *Shaw v. Clark*, 49 Mich. 384, 13 N. W. 786; *Bank v. Harrison*, 10 Fed. 243. The cases cited by defendant's counsel arose under very different statutes, and for that reason they are not in point. We therefore hold that the statute gives defendant no right to recover the moneys paid to plaintiffs for margins. That there is no liability independently of statute is not open to discussion. The law leaves both parties where it finds them. *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. 557; *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. 221; *Kahn v. Walton* (Ohio Sup.) 20 N. E. 210.

The trial court erred, however, in refusing costs to defendant. Plaintiffs, having failed to establish their cause of action, were not entitled to costs; and in all cases in which the plaintiff is not entitled to costs the defendant recovers costs as a matter of course. His rights do not depend upon his sustaining a counterclaim which he may have interposed. It depends solely upon his preventing a recovery of costs by the plaintiff. Had defendant set up no counterclaim, there would have been no doubt about his right to costs. He is in no worse position because he did interpose a counterclaim, and failed to sustain it. *Ury v. Wilde* (Super. N. Y.) 3 N. Y. Supp. 791.

On plaintiffs' appeal, the judgment, so far as it dismisses the action, is affirmed. On defendant's appeal, the judgment is modified by allowing to defendant his costs in the district court. As so modified, the judgment is in all respects affirmed. All concur.

MORSE et al. v. MOORE.

(22 Atl. 362, 83 Me. 473.)

Supreme Judicial Court of Maine, May 26,
1891.

Exceptions from supreme judicial court,
Sagadahoc county.

This was an action of assumpsit to recover for two cargoes of ice under a written contract. The verdict was for the plaintiffs, for the full contract price, with interest. The defendant contended at the trial that the ice shipped was not such as was called for by the contract; and that its quality was such, on account of excessive sap, that it had no market value, and was worthless when loaded on board the vessels in this state, or was at least worth very much less than the contract price. Both cargoes were discharged in March, 1888, at Richmond, Va., and placed by the defendant in his ice-house. He denied that the ice was accepted. Upon the question of acceptance, the defendant offered the following letters and telegram, which were received by the plaintiffs. The telegram and the parts of the letters inclosed in brackets were admitted by the court, and the rest of the letters were excluded.

"[Richmond, Va., March 13, 1888.

"Mr. Jno. A. Morse, Bath, Maine:

"Dear Sir: The 'Hyde's' cargo is worse as it goes down. The sap averages five inches on each cake. Please telegraph me what to do about 'Crockett' cargo. She is due, and if as bad as 'Hyde' I do not want it.] Do not send any more unless you can send ice up to contract. Please wire me on receipt of this what you will do. It is not only a loss on cost of ice, but freight also, and storing. The top tier's as white as snow as soon as the sun strikes it.

"Yours,

Warner Moore."

"Received at Bath, Maine, March 22nd, 1888."

"Dated at Richmond, Va., 21."

"To J. A. Morse:

"Crockett arrived; more sap than 'Hyde's.' What shall I do with it? Answer.

"Warner Moore."

"[Richmond, Va., March 21, 1888.

"Mr. J. A. Morse, Bath:

"Dear Sir: I telegraphed you, 'Crockett arrived. More sap than Hyde's. What shall I do with it?' Answer." I wrote you several days ago about the ice but no reply.] I measured several cakes, and they have from four to six inches of sap. Haley, of Gardiner, is here, and I am sorry to say he has seen it, and is using his influence against my wagons. It is awful. Why did you send me such stuff? My manager, Mr. Gaubert, came from Gardiner. He was with Haynes and Dewitt Co. for years, and he never saw such ice shipped before. I am sorry you unload this bad ice on me. My contract calls for prime quality. Answer by first mail. Oblige,

Warner Moore."

The defendant was called as a witness to prove that he had not accepted the ice, and was asked what he did with the cargoes after they were discharged at Richmond, and after the telegram and letter dated March 21st; but upon objection the court excluded the questions.

Upon this point the following instructions were given to the jury: "Was it clear, merchantable ice, within the meaning of the term as used among merchants? If so, then perhaps that may end any further consideration of the case; because it was delivered on board the defendant's vessel, and carried away by him, and you may be satisfied, from the evidence that has been submitted to you, was used by him in some way.

"If, under the circumstances, he takes the commodity, and carries it away to a distant state, and unloads it from the vessels, and puts it into his own ice-house, and commences to deliver that as his own property, what would you, and what do you, infer as to the question of acceptance under the contract?"

The defendant claimed that the ice in controversy had from three to four inches of sap or snow ice upon it as an average, and that quite a portion of it had from six to eight inches of sap upon it, and that for these reasons it was not merchantable, and was valueless. This was denied by the plaintiffs. The defendant contended, also, that he could receive the ice, and, if it was not of the quality required by the contract, that in this action against him for the price he could prove the fact, either in diminution of damages, or in full answer to the action, if the ice was of no value. Upon this branch of the case the presiding justice instructed the jury as follows:

"He cannot, under a contract like this, receive the property called for by the contract, and accept it, and then turn round and say that he is not bound to pay the price which the contract calls for. * * *

"It has been contended to you by counsel that the defendant might receive this property and keep it, use it, and sell it, and still it is open to him to show that it was of no value when he received it, and, therefore, that he is not required to pay anything. I do not understand that to be the law. That may be and is the rule of law when a contract of sale is executed with a contract of warranty of the thing sold. Then the warranty goes to the purchaser as his protection against defects that may be discovered in the thing sold. But this is not an executed contract,—this written contract between the parties. It was executory." "It is like a contract for sale by sample, where a merchant agrees to sell a certain commodity which shall conform to a sample which he delivers to the purchaser. * * * Still, if he finds that it does not in all respects conform to the sample, he has the right of accepting it, and, if he does accept it as a compliance with the contract, he is bound to pay the contract price.

"Considering all the facts as shown to you,

you must determine, if you are not fully satisfied that the ice in all respects conformed to the terms of the contract, whether this defendant accepted it under the contract so as to preclude him from throwing it back onto the hands of the plaintiff.

"When he took the property and carried it away the property passed to him."

"If you do find an acceptance under the rules I have given you, I say to you that the defendant is bound to pay the contract price."

"If you find an acceptance of the property by the defendant, then he is liable for the contract price."

The defendant excepted to these rulings and instructions.

A. N. Williams, for plaintiffs. C. E. Littlefield, for defendant.

PETERS, C. J. The controversy in this case grows out of an agreement between plaintiffs and defendant, made and delivered in this state, which runs as follows: "This agreement, made and entered into this seventh day of January, 1888, by and between Morse & Sawyer, of Bath, Maine, of the first part, and Warner Moore, of Richmond, Va., of the second part, witnesseth:

"That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and agree to deliver at their wharves at Water Cove, (Cape Small Point, opposite Burnt Coat Island, as seen in Coast Chart No. 6, from four to six miles west of Seguin Island light house,) Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of good, clear, merchantable ice, not less than twelve inches in thickness, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton of two thousand pounds. Each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days, as may suit party of second part, for the amount accompanying bill of lading and weigher's certificate of said cargo. Cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Va., where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question whether, having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiffs who sue in this action of indebitatus assump-

sit for the contract price; the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was without qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud, of course) absolutely terminates the obligation of the vendor. The judge further ruled that "when the defendant took [that is, by a hired carrier] the property and carried it away the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty, a condition precedent amounting to warranty, in the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial for present purpose, whether it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally—our own cases included—that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract if relied upon at the time by the purchaser. *Bryant v. Crosby*, 40 Me. 9; *Randall v. Thornton*, 43 Me. 226; *Hillman v. Wilcox*, 30 Me. 170; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, and cases cited. Here there is a clear description of both the kind and quality of the ice,—the quality to be merchantable.

It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed, instead of executory, contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that in an executory contract any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is that a particular article actually delivered possesses

the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract, and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified; and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Prof. Wharton (Whart. Cont. § 564) expresses the idea in these words: "A substantial, though partial (defective) performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation, (implying warranty,) not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain, and afterwards of the sale. So in an executory contract the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods, whether for present or future delivery, are of an executory nature. All sales by sample are such. The author of *Smith's Leading Cases* (8th Ed. vol. 1, pt. 1, p. 339) says in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandise is delivered to or set apart for the purchaser." Every contract is executory on the one side or the other until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a

waiver of any defect of quality, even if the article did not so correspond; evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place, or manner of performance, or that affect merely the taste or fancy, perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser. *Baldwin v. Farnsworth*, 10 Me. 414; *Lamb v. Barnard*, 16 Me. 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although even much inferior in quality to the description contained in the contract. Certainly it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plaintiffs agreed to deliver ice, which they warranted should be good, clear, and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel, intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present, or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of the cargoes, upon the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the

contract, an agreement of warranty in such positive terms. Still it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant after notice should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchandiseable condition. There was no lack of objection or protest from the defendant. He wrote repeatedly, and telegraphed the plaintiffs, expressing his disappointment, and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of reshipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice, and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture, and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense.

Mr. Benjamin, (Benj. Sales, 3d Am. Ed. p. 888,) in allusion to the buyer's remedies after receiving possession of the goods, says he has three remedies against the seller for breach of the warranty of quality: First, the right to reject the goods if the property in them has not passed to him; second, a cross-action for damages for the breach; third, the right to plead the breach in defense to an action by the vendor, so as to diminish the price. These remedies are mentioned without any distinction between kinds of sales. The propositions are general, without any intimation that the procedure does not apply to warranties in executory sales. In the text such a distinction is not even noticed. In the notes to the text, however, it is remarked by the American editor that there are New York decisions inconsistent with the rule stated in the text. The first of these remedies—that of rejecting the goods—seems especially applicable to executory and inapplicable to executed sales, because it precedes acceptance, while in executed sales there has been acceptance, and the title has passed. It is only in executory contracts and contracts that are merely *prima facie* executed that the title has not passed.

Mr. Benjamin states further that the buyer's remedies are not dependent on his return of the goods, nor is he bound to give notice to the vendor; "but," he adds, "a failure to return the goods or complain of the quality raises a strong presumption that the complaint of defective quality is not well founded." Prof. Parsons, in the text and notes of his work on Contracts, lays down the same legal propositions that Mr. Benjamin does, making not a word of allusion to there being any difference in the application of them between sales executed and sales

executory. He also states that if the buyer accepts goods inferior to such as are stipulated for, his continued possession without complaint will be a presumption against him on the question of damages. Pars. Cont. (6th Ed.) §591, and notes.

Mr. Smith, in *Leading Cases*, in notes to the case of *Chandelor v. Lopus*, (8th Ed., vol. 1, pt. 1, p. 294,) discusses and fully indorses the same rules, as deducible from the authorities, and he and the editors in the last American edition of that work cite and compare a great many of the decided cases on the subject, and they give no recognition to a distinction between executed and executory contracts in the application of such remedies. We quote a few passages from their comments: "When specific property is referred to, still, if the reference be through the medium of a sample, the contract will be so far executory as to fail of effect unless the bulk of the commodity corresponds with the sample." "Nor will his [buyer's] right to indemnity or compensation necessarily end on his acceptance and use of the goods with full knowledge of the defect, but he will be entitled to bring suit on the contract, and receive damages for the breach of the implied engagement that the bulk of the commodity should correspond with the sample exhibited at the time of the sale." In the case at bar there was an ideal or descriptive sample,—a description equivalent to the exhibition of a sample. There can be no doubt that, if the vendee may bring an action of his own on the contract, he can as well defend against an action brought upon the contract by the vendor. "The right of the vendee to rely on the breach of warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money may now be regarded as established in England, and in most of the courts in this country." "The course of decision at the present day tends towards the position that a partial failure of consideration may be given in evidence in mitigation of damages, even when the original contract remains in full force, and the suit is expressly or impliedly founded upon it." "In the case of *Withers v. Greene*, 9 How. 213, the supreme court of the United States receded from the ground taken in *Thornton v. Wynn*, 12 Wheat. 183, by holding that a partial failure of consideration, growing out of fraud or breach of warranty, may be set up as a defense to an action brought by the vendor. The same rule applies to sales under an executory contract or by sample, and the buyer may rely on the deficiency of value resulting from the failure of the property sold to correspond with the terms of the contract as a reason why he should not be compelled to pay the price in full. *Mondel v. Steel*, 8 Mees. & W. 858; *Babeock v. Trice*, 18 Ill. 420; *Dailey v. Green*, 15 Pa. St. 118."

We are unable to find in the English cases much support for any discrimination in the

application of the above doctrine between sales executed and sales executory, although very many of the modern English cases arise out of sample sales and other contracts of an executory nature. The principal support for it is found in some of the New York cases and in those of a few other states that have followed the lead of the New York court in this respect. There are cases which hold to a modification of some of these forms of remedy, having no bearing, however, on the decision of the present case. Some courts have held that a rejection or rescission is not allowable if the goods tendered are of the kind or species contracted for, even though the quality be inferior; but in this state the doctrine of rescission in cases of warranty has been fully established. *Marston v. Knight*, 29 Me. 344. In a few cases there is a leaning towards the doctrine that an acceptance becomes a waiver after a long-continued acquiescence on the part of the vendee. 1 Smith, Lead. Cas. (8th Ed.) part. 1, pp. 324, 326, 360, 362, et seq.

It is noticeable that in the more modern English cases the courts have preferred to regard executory contracts as based upon a condition precedent, rather than upon warranty. No essential difference of remedy follows from it, though a different style of pleading may be apposite. Instead of a breach of warranty and a suit upon warranty, it becomes, on the new idea, a failure to perform a condition precedent and a suit on the contract. In leading cases, before cited, the commentator expresses the theory in an alternative way in these words: "The right of a vendee to rely on a breach of a mere warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money, may now be regarded as established in England, and in most of the courts in this country." But the editor at the same time says (page 334) that "such cases have generally proceeded on the ground of an express or implied warranty." See, also, in 2 Smith, Lead. Cas. pt. 1, the discussion under case of *Cutter v. Powell*, at pages 18, 20, 22, et seq. Mr. Benjamin inclines to the view taken in the English cases, quoting Lord Abinger as deprecating the prevalent habit of treating a condition precedent as a warranty. Other writers incline favorably towards the views of Lord Abinger as expressed by him in the case of *Chanter v. Hopkins*, 4 Mees. & W. 399, although admitting that the prevailing theory continues the other way.

The length of this opinion reasonably precludes further discussion of points that may be regarded as merely theoretical. Whether, in the present case, it be a condition or a warranty, and that might be at the election of the defendant to determine as he pleased, we think the defense set up to the action should have been heard upon the ground of a breach of condition, or of warranty, or upon both grounds.

The main question for our decision has not been the subject of much discussion in our own state, although the principle involved has been acted on in a great number of instances, and there have been judicial expressions and rulings affecting it. In *Folsom v. Mussey*, 8 Me. 400, it is allowed that evidence of consideration may be received in actions between parties to a contract, to reduce the damages. In *Herbert v. Ford*, 29 Me. 546, the doctrine is approved. *Rogers v. Humphrey*, 39 Me. 382, directly applies to the present facts. It is there held that "when a party seeks to recover payment for articles delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit." The case of *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630, in its effect sustains the same principle. It is there decided that in a conditional sale the mere fact of delivery by the vendor without performance by the vendee, nothing being at the time said about the condition, might afford presumptive evidence of the waiver of the condition, but that the fact may be explained and controlled, and whether it be a waiver of the right of title or not would be a question of fact to be ascertained from the testimony. So in the present case, whether acceptance be a waiver of the full performance of the condition precedent or not is likewise a question to be settled upon testimony. The position of parties is reversed in the two cases, but the principle is the same.

The first case in this country, except a Maryland decision to the same effect, and perhaps the leading case in the recognition of the principle that affirmation of quality establishes warranty, is *Hastings v. Lovering*, 2 Pick. 214, where oil then in Nantucket was sold to be delivered in Boston in ten days, the vendor describing the same to be "prime winter oil." That was in fact as much of an executory contract as is the one under discussion, although not in form such. The point was taken in the trial that the contract, although executory, was settled by a bill of parcels, given at delivery, the executory agreement having no further effect; but the court overruled the position. The case is effective on the present question as showing that acceptance has no greater effect as an estoppel in executory than in executed sales. Other Massachusetts cases bear, either directly or indirectly, upon the question. In none of them is there any judicial utterance indicating that executory and executed sales do not, on this question, stand alike. *Perley v. Balch*, 23 Pick. 283; *Dorr v. Fisher*, 1 Cush. 274; *Henshaw v. Robins*, 9 Mete. (Mass.) 83; *Mixer v. Coburn*, 11 Mete. (Mass.) 559; *Morse v. Brackett*, 98 Mass. 205. Several Connecticut cases that are often cited as supporting the theory that description imports warranty, and that the defendant may recoup damages for a breach of contract if the vendor brings a suit, were cases

of executory contracts or sales. *McAlpin v. Lee*, 12 Conn. 129; *Kellogg v. Denslow*, 14 Conn. 411. And of the same character is the leading case in the supreme court of the United States on the same question. *Lyon v. Bertram*, 20 How. 150. In that case the vendor was to deliver a cargo of flour within three weeks, the price to be according to the inspection to be made at delivery. The contract was in form a sale, but in effect a contract for future sale and delivery. The same deduction may be made from the cases of so many of the states that the rule may be fairly characterized as general; and the same result is producible from the English cases.

The New York court held in earlier cases that warranty in an executory contract did not in ordinary circumstances survive delivery and acceptance. But the doctrine grew up from the theory of law, maintained for a great while by that court, that description of quality is not a warranty of quality. In *Leading Cases*, before cited, it is said, in distinguishing the New York theory from that of Massachusetts and Pennsylvania: "The authorities in New York assume that calling a thing by a particular name, or designating as of a certain quality, is no evidence of a warranty or contract that it should be as described." Certainly a thing cannot survive that does not exist. *Wilde, J.*, in *Henshaw v. Robins*, 9 Mete. (Mass.) 90, declared upon that ground that the authorities in New York were without influence upon the question of effect of acceptance in Massachusetts, saying: "Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty express or implied, and they therefore have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser."

The last-named rule of the New York cases was found to be so much at variance with the authorities elsewhere that in the case of *White v. Miller*, 71 N. Y. 118, all previous cases which held that warranty did not follow from description of quality were overruled; and, as a natural, if not necessary, consequence thereof, the tendency of that court seems in later cases to have been progressive towards the adoption of the other rule, that acceptance in cases of executory sales with warranty does not preclude the vendee from afterwards claiming damages against the vendor for a breach of the warranty; if the court has not already arrived at that point. There are late cases in that state, of express warranties, the doctrine of which seems to completely vindicate the position of the defendant in the present case, even should he be obliged to stand or fall upon the interpretation of the law of his contract according to the New York authorities. In *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, and in *Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, it is declared that an express undertaking to deliver in the future articles of a certain quality was an express warranty of such quality when the articles were afterwards delivered,—a warranty that survived an acceptance of the articles delivered; and that the rule would be the same whether the goods were in existence at the time of contract of sale or were to be manufactured.

Upon the authority of these cases the contract in the case at bar contains an express warranty. An express undertaking to produce a thing is an express warranty of the thing produced.

Exceptions sustained.

WALTON, VIRGIN, LIBBEY, HASKELL, and WHITEHOUSE, JJ., concurred.

CROLY v. POLLARD.

(39 N. W. 853, 71 Mich. 612.)

Supreme Court of Michigan. Oct. 19, 1888.

Appeal from circuit court, Wexford county, in chancery; Silas S. Fallass, Judge.

C. C. Chittenden, for appellant. Sawyer & Bishop, for appellee.

SHERWOOD, C. J. This case is an appeal from the Wexford circuit court, in chancery. The case appears from the record as follows: The complainant bought a locomotive boiler, and engines belonging thereto, of the defendant, November 27, 1883, for \$300, and took a bill of sale for the same, making payment therefor by two notes, one for \$100, payable in six months, and the other for \$200, payable in one year. These notes complainant secured by a mortgage on real estate in the county of Wexford. Complainant placed the boiler and engines in a shop, and about two years thereafter the property was taken from him by writ of replevin under a claim made by a Mr. Simons of paramount title. Complainant thereupon notified the defendant of the writ and of the claim made therein, and requested him to defend the title to the property. This the defendant refused to do, claiming that he never had any title thereto, and never sold the same to the complainant, and, the complainant making no defense, Simons succeeded in his suit, and complainant lost his property under the title made by Simons. The only consideration received by the complainant for his mortgage given to defendant was the boiler and engine. The consideration having wholly failed, the complainant requested the defendant to discharge the mortgage, which he refused to do, and thereupon defendant foreclosed the mortgage by advertisement, and bid off the property upon the sale. Complainant prays for a decree setting aside the sale and annulling the mortgage. The defendant, in his answer, avers that he did not sell the boiler and engine to the complainant, but that complainant purchased them from John Rosevelt and Robert Christensen, and that defendant loaned complainant the money with which to make the purchase, and took the mortgage above mentioned as security for his loan; that he had never seen the boiler and engine in question until a long time after complainant made his purchase of Rosevelt and Christensen. The case was heard upon pleadings and proofs, and the circuit judge granted a decree in accordance with the prayer of the bill, and defendant appeals.

The testimony in the case was taken before the circuit judge in open court. Upon the material point in the case there is a contradiction between the parties in their testimony. The

circumstances of the case, and the written testimony, however, are corroborative of the testimony of the complainant. The question in the case is, was the mortgage given by the complainant to the defendant for the loan of \$300, or was it given to the defendant as the purchase price of the boiler and engine mentioned? The title to the property, which the complainant received, came originally from Rosevelt and Christensen. Christensen, on the 7th day of September, 1883, transferred the property to Rosevelt, by written bill of sale, with warranty of title, and Rosevelt sold and transferred the property by a like bill of sale and warranty to the defendant, on the 27th day of November, 1887, and the defendant, in his testimony, says he supposed that, when he conveyed by his bill of sale the property to the complainant, he got title thereto. That bill of sale reads as follows: "For a valuable consideration to me in hand paid by James Crolly, I hereby transfer and set over to the said James Crolly all my right, title, and interest in the locomotive boiler and engines mentioned in the written bill of sale." This was written on the back of the bill of sale from Rosevelt to the defendant, and was duly signed by the defendant, and dated the day the complainant made his purchase. It is claimed, however, by counsel for the defendant this bill of sale never gave the complainant any warranty of title to the property, either express or implied. The complainant testifies that he bought the property of the defendant, and gave his notes, secured by the mortgage, therefor, and the defendant, when asked for a bill of sale of the property, gave the complainant the one above quoted. There is no doubt, I apprehend, but that a sale of personal property implies an affirmation by the vendor that the property is his, and he therefore warrants the title, unless it is shown by the facts and circumstances accompanying the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the property. It is claimed on the part of the defendant that such facts and circumstances were shown in this case, and there is testimony to that effect. It is, however, contradicted upon the other side by the testimony of the complainant. The circuit judge heard all the testimony. The witnesses were before him. His means of judging of the credibility of the testimony offered was far superior to ours, and it appears from the decree rendered he found against the defendant, and I do not think we should be justified in disturbing that finding. The preponderance of the testimony is clearly with the complainant. The decree at the circuit must be affirmed, with costs. The other justices concurred.

WISCONSIN RED PRESSED-BRICK CO.
v. HOOD et al.

56 N. W. 165, 54 Minn. 543.

Supreme Court of Minnesota. Sept. 8, 1893.

Appeal from district court, St. Louis county; Ensign, Judge.

Action by the Wisconsin Red Pressed-Brick Company against David Hood and others to foreclose a lien for materials used in erecting a building. Judgment for defendants, and new trial denied. Plaintiff appeals. Reversed.

Wm. Lancaster, for appellant. Wm. B. Phelps and White, Reynolds & Schmidt, for respondents.

COLLINS, J. Plaintiff corporation, having furnished a quantity of bricks for use in the erection of a factory building and an engine house for defendant refrigerator company, brought this action to foreclose its lien. The factory had been built by defendant Hood under a contract with the refrigerator company, while the engine house had been erected by the company itself, Hood having been the superintendent of the work. All of the bricks were purchased by Hood, the agreement for the same being in writing, and, according to its terms, plaintiff was to furnish free on board cars at its yards, for \$5.50 per thousand, a specified quantity of bricks "of the grade known as 'common brick,'" and all to be "of good quality, and equal to sample sent" by the superintendent of the yards. Under the contract for the erection of the factory building, also in writing, Hood was to use "the best quality of red, kiln-run, well-burned Menominee brick, or some other red brick equally as good and acceptable." Upon the trial of the cause, without a jury, the court below found the contract between the defendants to be as above stated, but that Hood did not use "kiln-run" bricks, as he had agreed. It also found that plaintiff had contracted with Hood to furnish "common brick, of good quality, to be used in the erection of a factory and warehouse and engine house," at \$5.50 per thousand, and with full notice and knowledge that these bricks were to be used in the erection of "said warehouse." There was no finding whatever as to whether the bricks furnished were to or did correspond with the sample sent. It was also found that "many" of the brick furnished and used in the construction of the buildings were not common brick of good quality, nor were they fit or proper to be used in the walls, the defects being specifically stated, and, further, that such defects could not have been ascertained before the walls were built, and the defective bricks exposed to the elements upon outside surfaces, for at least one month. It was further found that, "had said brick been of the quality and kind called for by the terms of the contract between plaintiff and

said Hood and said Hood and the refrigerator company, and as agreed by plaintiff, they would have been worth" the agreed price, but, because of the defects mentioned, they were worth but \$2.50 per thousand. From the conclusion of law it may be gathered that this finding, although vague and indefinite as to whether it fixes the value of the "many" bricks previously referred to as failing to meet the contract, or the value per thousand of the entire quantity furnished, has reference to the latter. It is the only finding, however, in which the amount of damages sustained by defendants, because of the alleged breach of plaintiff's contract, is fixed or attempted to be fixed. If unsupported by the evidence, or insufficient to warrant the conclusion of law by which the value of the entire quantity of bricks furnished by plaintiff was reduced to \$2.50 per thousand, a new trial must be had, and this remark applies to all of the findings of fact covered by plaintiff's assignments of error.

Counsel for defendant Hood evidently tried this case upon the theory that there was an implied or an express warranty that the bricks to be furnished under the contract between plaintiff and Hood should be suitable for the walls of the factory and the engine house, and in his brief it is asserted that there was both an implied and express warranty of this nature, the claim being predicated upon the fact that plaintiff knew, when making the contract, that Hood intended to use the bricks in the walls of the building he had agreed in writing to erect for the refrigerator company; while counsel for the latter present their case on appeal as if the court had found as a fact that the bricks to be furnished were to correspond with certain samples, and had failed so to do, as to which the findings are silent, as before stated. Therefore some confusion necessarily arises as to the ground upon which counsel claim that the order refusing a new trial is sustainable. It seems to be conceded that the plaintiff's contract was executory. It may have been a sale by sample, and, if so, the bricks furnished may not have been in compliance with the requirements, but these questions are not before us for obvious reasons. As the contract was in writing, and all of the conditions respecting quality have been stated, it is plain that there was no express warranty of the bricks. Nor can any warranty not implied from its terms be added, either by implication of law or by parol proof, to the written contract. It was shown by undisputed testimony that there were several grades of bricks known to the trade, the cheapest and poorest being the grade mentioned in plaintiff's contract with Hood, namely, "common." A better and more expensive grade is styled "kiln run," and it was this grade, not "common," which Hood, in his contract with the refrigerator company, agreed to use, and, while the work

was progressing, insisted repeatedly that he was using, although he knew to the contrary. The difference between these two grades is substantial, according to the evidence, both as to quality and value. Kiln run include all bricks found in a kiln, taken as they come, while common are the bricks remaining after some of the very best quality have been taken out. It follows that the common grade will include a much larger percentage of soft-burned bricks than kiln run, and that a wall built of the grade first mentioned cannot be as durable, nor can it be made as uniform in color, as when built of kiln run. At any rate, Hood agreed to use the latter, and deliberately purchased an inferior article. There was no evidence in the case, nor was there a finding of fact, which would justify the claim of counsel that there was an implied warranty that the bricks to be furnished by plaintiff should be suitable for the use intended by Hood. The written contract was complete and unambiguous, and by its terms plaintiff was to furnish the grade of bricks known as common, to be of good quality and equal to sample. Because the plaintiff was informed that the bricks were to be used in building a factory for defendant company, it cannot be said that there was an implied warranty that they should be reasonably fit for the purpose. Hood contracted for, and plaintiff agreed to furnish, a specific article of a well-recognized kind or description, according to the findings. This article was not to be supplied to satisfy a required purpose, as was the fact in *Breen v. Moran*, (Minn.) 53 N. W. Rep. 755, cited by counsel, that purpose, and not any specific article, being the essential matter of the contract; but it was to be of a well-known grade and quality. If an order be given for a specified

article of a recognized kind or description, and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so. *Goulet v. Brophy*, 42 Minn. 109, 43 N. W. Rep. 834; *Leake, Cont.* 404. Applying this well-settled and sensible rule to this case, it is obvious that a conclusion of law based to any extent upon a finding of fact that the bricks were not fit or proper to be used in the erection of the buildings cannot be sustained. Again, it is obvious that a conclusion of law by which the amount of damages sustained by the refrigerator company is fixed, solely and wholly based on the finding of fact before mentioned,—that, had the bricks "been of the quality and kind called for by the terms of the contract between plaintiff and said Hood and said Hood and the refrigerator company," etc.,—cannot stand. This finding assumes that plaintiff agreed to furnish the same grade of bricks that Hood agreed with the refrigerator company to put into the walls of the factory building, which was not the fact. The plaintiff was under no obligation to furnish bricks known as "kiln run," and, so far as shown by the record, had no knowledge that Hood had obligated himself to do so. This finding was certainly based on the presumption that, as to kind and quality of materials, the contracts were alike.

We need not refer specifically to any of the remaining assignments of error, for we are not to anticipate the rulings of the court below on another trial. We cannot refrain from remarking, however, that the delinquencies of the defendant Hood in the performance of the contract made with his co-defendant must not be unloaded onto the plaintiff. Order reversed.

CARLETON et al. v. LOMBARD, AYERS & CO.

(43 N. E. 422.)

Court of Appeals of New York. April 7, 1896.

Appeal from supreme court, general term, First department.

Action by T. Osgood Carleton and another against Lombard, Ayers & Co., a corporation, for alleged breach of contract to deliver plaintiffs a specified quality and quantity of petroleum. From a judgment of the general term, First department (28 N. Y. Supp. 1107), affirming a judgment for defendant, plaintiffs appeal. Reversed.

James C. Carter, for appellants. B. F. Tracy, for respondent.

O'BRIEN, J. The plaintiffs sought to recover damages in this action for the breach of an executory contract for the sale of goods. The defendant is a domestic corporation engaged in refining crude petroleum for sale and export, and both parties to the action were members of the New York Produce Exchange. On the 10th of January, 1887, the parties entered into a contract in writing, which, by its terms, was made subject to the rules of the exchange, whereby the defendant agreed to sell and deliver to the plaintiffs a large quantity of refined petroleum. The following is the material part of the contract, in which the kind, quantity, and price of the goods are specified, as also the time and place of delivery, in these words: "Fifty-five thousand cases, ten per cent., more or less, each case packed with two of their patent cans, with low screw tops or nozzles and brass labels, containing five gallons each of refined petroleum of their Stella brand, color standard white or better, fire test 76 degrees Abel or upwards, at eight and one-half cents per gallon, cash on delivery. To be delivered in yard, free of expense to vessel; to be ready not earlier than the twenty-fifth January, 1887, not later than the tenth of February, 1887, with twenty-five days to load. Brass labels one-half of one cent each." It appears that before closing this contract the plaintiffs had received from the firm of Graham & Co., merchants at Calcutta, British India, an offer to purchase a like amount of refined petroleum of the same brand, color, test, and packing, to be shipped at the port of New York, not later than March 15, 1887, for their account and risk, on board the British ship Corby, bound for Calcutta. This offer the plaintiffs accepted on the same day that they entered into the contract with the defendant, and immediately after closing it. On or before March 1, 1887, the defendant delivered the oil, packed in the manner specified in the contract, to the plaintiffs, alongside the Corby, at its factory at Bayonne. The delivery by the defendant to the plaintiffs, and by the plaintiffs to their vendees in Calcutta, was thus accomplished by substantially the same act. The rules of the Produce Exchange, which

were made part of the contract between the plaintiffs and the defendant, so far as material to the questions involved, were these: (1) The committee on petroleum were authorized and required to license duly qualified inspectors, members of the exchange, for the various branches of that business. (2) Buyers should have the right of naming the inspector, but must do so at least five days before the maturity of the contract. Failing in this, the seller might employ any regular inspector at the buyer's expense, and his certificates that the oil is in conformity with the contract shall be accepted. (3) When goods are delivered to vessel by buyer's orders, the acceptance of them by buyer's inspector shall be an acknowledgment that the goods are in accordance with the contract. The plaintiffs, under the rule, named the inspector, who on March 1, 1887, after the cargo was loaded on board the Corby, made and delivered to them a certificate in writing which certified that he had inspected the oil shipped on board the Corby, and stated therein the brand, color, test, and gravity of the same, which corresponded with the contract. The vessel started upon her voyage. The plaintiffs paid the defendant the purchase price of the oil, and then drew upon the parties in Calcutta to whom they had sold, for the price as between them, and their draft was paid. The vessel did not arrive at Calcutta till some time in June, and, when she began to discharge the cargo, it was found that the cans had become corroded from the inside by some foreign substance in the oil, and so perforated that they did not retain their contents. A large part of the oil was lost by leakage, and the whole cargo was pronounced unmerchantable, and finally sold at Calcutta for a small sum, for account of whom it might concern. When the condition of the goods was discovered by the consignees, during the discharge of the cargo from the ship, the plaintiffs were notified by cable of the situation and the condition of the oil. They laid these dispatches before the defendant, and a long correspondence by cable followed, in which the defendant participated, and of all of which it had knowledge. The purpose of it was to ascertain the defect, if any, in the oil, and to reach some amicable arrangement. In the end all parties seem to have become satisfied that a large loss had been sustained, and the parties in Calcutta, who had paid the plaintiffs for the property, called upon them to make good their contract. The plaintiffs in turn called upon the defendant to indemnify them from loss, and it then took the ground that it had, in all respects, performed its contract, and was not liable for the result.

In July, 1888, Graham & Co., in Calcutta, brought suit in the supreme court in New York, against the plaintiffs, to recover their damages. The complaint in the action, after alleging the legal obligation of these plaintiffs to deliver to them a merchantable article of refined petroleum at the port of New York,

fit for export and transportation by sea, in a sailing vessel, to India, averred that in fact it was not a merchantable commodity, but on the contrary a very large portion of the cans so shipped contained petroleum imperfectly refined, containing water, acids, and other foreign substances, which would, in the course of transportation, corrode the cans, and should have been eliminated therefrom by proper refinement, and the presence of which rendered the article shipped unmerchantable and unfit for transportation. There were various other breaches of the contract alleged, not material to state. Notice was given to the defendant to come in and defend the action, and it complied with the notice. It participated in the preparation of the defense, the production of proofs, and at the trial was represented by counsel, and had every opportunity to resist the claim. The jury, however, rendered a verdict for the plaintiffs in the action, and against the defendants, who are the plaintiffs here, upon which a judgment was entered for nearly \$50,000. The plaintiffs in this action, upon the refusal of the defendant to indemnify them, paid this judgment, and called upon the defendant to reimburse them, and upon its refusal this action was commenced, in March, 1891.

The complaint alleges, as did that in the prior suit, substantially, that the oil delivered by the defendant alongside the *Corby*, at Bayonne, was not in fact refined, merchantable petroleum, but, on the contrary, the cans contained a large proportion of oil imperfectly refined, and containing foreign substances, which would, in the course of transportation, corrode the cans, and which should have been eliminated by proper refinement, the presence of which rendered the goods unmerchantable and unfit for transportation; that in consequence of this defect the cans, with few exceptions, had become corroded and perforated by the action of the contents, so that they would not and did not retain it, and hence could not be delivered, as an article of merchandise or commerce, at the port of destination; that these defects were latent and of a hidden nature, and such as could not have been discovered by inspection, or any examination that was practicable for the buyers to make at the time and place of delivery. The pleading then states with considerable detail the correspondence by cable after the arrival of the *Corby* at Calcutta, the defendant's connection with it, the action brought against them by the *Grahams*, the issues therein, the verdict and judgment, and the payment of the same by the plaintiffs, who were defendants in that action. The action having been brought to trial, a verdict was directed in favor of the plaintiffs, but the judgment was reversed at the general term upon a construction of the contract unfavorable to the plaintiffs, and upon exceptions taken at the trial, and a new trial was ordered. On the new trial the plaintiffs' complaint

was made when the first judgment was before it for review. On the second appeal that court adhered to its former ruling, and affirmed the judgment.

The property which was the subject-matter of the contract between the parties was not in existence at the time it was made, but was thereafter to be produced by refinement of the crude material through a manufacturing process by the defendant. It was therefore a contract by a dealer with a manufacturer, and is subject to the rules and principles that apply to executory contracts for the sale and delivery of goods when the parties occupy these relations to each other. It is a conceded fact in the case that the oil delivered by the defendant to the plaintiffs alongside the *Corby* was of the kind and quality described in the written contract. In quantity, brand, color, and fire test, it corresponded with the terms of the contract. But it is claimed that, while all this is true, yet there was a latent or hidden defect in the article so delivered, the result of improper refinement or manufacture, not discernible upon inspection, which rendered the oil unmerchantable, and unfit for transportation by sea in a sailing vessel, and that this defect was the cause of the loss which the plaintiffs have sustained. The most important question in the case is whether the defendant, notwithstanding its written contract, is bound to make good the loss, assuming that it was caused by such defect in the goods. The general rule of the common law, expressed by the maxim *caveat emptor*, is not of universal application, though the exceptions are quite limited; and one of them is the case of a manufacturer who sells goods of his own manufacture, who, it is said, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. The seller in such a case is liable for any latent defect arising from the manner in which the article is manufactured, or from the use of defective materials, the character of which he is shown or is presumed to have knowledge of. This rule, and the reasons upon which it rests, or its qualifications and limitations, have seldom been stated in the same form by courts and writers upon the subject; but that it exists, as a principle in the law of contracts, cannot be doubted. The leading case in this state is *Hoe v. Sanborn*, 21 N. Y. 552. The learned judge who framed the opinion in that case, after stating the rule, proceeds to show the grounds upon which it rests. In his view, while this peculiar obligation is called a "warranty," for convenience, it does not rest upon any supposed intention of the parties or agreement, in fact, but is one which the law raises upon principles foreign to the contract, in the interest of commercial honesty and fair dealing, and analogous to those upon which vendors are held liable for fraud. It is quite difficult to reconcile the authorities upon the question, but it may be observed that they recognize the principle

that in such cases the seller and buyer do not deal with each other quite at arm's length; that the seller possesses superior knowledge on the subject, upon which the buyer is presumed to repose some degree of confidence; and that commercial honesty and fair dealing require that in such cases the seller be held bound to deliver the article free from secret or latent defects which are actually or presumptively within his knowledge. The principle was applied, in a later case in this court, to a contract for the sale of seeds of a particular description by the grower. It was there said that, as the grower of seeds must be presumed to be cognizant of any omission or negligence in cultivation whereby they were rendered unfit for use, there was the same reason for implying a warranty that they were not defective from improper cultivation, as, in the case of a sale of an article by a manufacturer, that it is free from latent defects. *White v. Miller*, 71 N. Y. 118. The latest case that I have been able to find upon the question is *Bridge Co. v. Hamilton*, 119 U. S. 108, 3 Sup. Ct. 537. The leading cases bearing upon the point, both in this country and England, are there reviewed, and the court stated the principle in these words: "When the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purpose for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects, of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of the seller, who was the manufacturer and maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

The principle is distinctly admitted in the opinion of the learned court below, and I do not understand that it is denied by the learned counsel for the defendant. It is strenuously urged, however, that it can have no application to a case like this, where the contract is in writing, with such ample description of the goods sold. But the obligation attached to an executory contract for the sale of goods by the manufacturer or maker cannot be changed by the mere fact that the contract has been reduced to writing. The writing, it

is true, is deemed to express the whole agreement of the parties, but since this peculiar liability arises from the nature of the transaction and the relations of the parties, without express words or even actual intention, it will remain as part of the seller's obligation, unless in some way expressly excluded. All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale. The parties may, of course, so contract with each other as to eliminate this obligation from the transaction entirely. The seller may, by express and unequivocal words, exclude it, and, in like manner, the buyer may waive it. So, also, the parties may provide for a delivery or inspection of the article when made, which will operate to extinguish the liability upon acceptance. *McFarlin v. Boynton*, 8 Hun. 449, and 71 N. Y. 604. In this case the parties did provide for an inspection of the oil. The scope and effect of that provision of the contract will be considered hereafter, but, aside from that, there was no language used indicating any intention on the part of the buyer to waive, or the seller to exclude, the liability of a manufacturer.

The proposition upon which the case turned in the court below, and upon which the judgment is defended here, was thus stated by the learned judge in the opinion at general term: "It is well settled that, when an article is sold under a contract which specifies the qualities which it shall possess,—no matter whether the language be a condition or a warranty,—the law will not, except in special cases, imply a warranty or condition that the article has other qualities. A warranty or condition, in a contract of sale, that the article sold has certain qualities, excludes the implication of a warranty or condition that it possesses other qualities." From the operation of this general proposition, it will be seen that the learned judge excepts special cases, which, however, are not designated. In its application to this case the rule thus stated must mean that since the parties have, in their contract, specified the particular brand, color, and fire test of the refined petroleum which was the subject of the sale, the manufacturer's obligation to deliver an article free from latent defects, arising from the process of manufacture, which would render it unmerchantable, has been excluded by implication. This is not, we think, the meaning of the rule to which the learned judge referred in the language quoted. The rule means that, where parties to a contract of sale have expressed in words the warranty by which they intend to be bound, no further warranty will be implied by law, but that expressed will include the whole obligation of the seller. *Benj. Sales*, § 666; *Deming v. Foster*, 42 N. H. 165. Moreover, this principle applies to sales of specific, existing chattels, and not ordinarily to sales of goods to be made or supplied upon the order of the buyer. There is much confusion in the cases on this subject, arising, doubtless,

from an inaccurate use of the term "warranty." When an article is sold by the owner or maker by the particular description by which it is known in the trade, it is a condition precedent to his right of action that the thing which he has delivered, or offers to deliver, should answer this description. But in many cases in modern times the sale of a particular thing by terms of description has been treated as a warranty, and the breach of such a contract a breach of warranty, whereas it would be more correct to say that it was a failure to comply with the contract of sale which the party had engaged to perform. *Chanter v. Hopkins*, 4 Mees. & W. 404; *Benj. Sales*, § 600. There are many cases in which such words of description are not considered as warranties at all, but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. 2 *Smith, Lead. Cas.* (6th Eng. Ed.) 27; 2 *Schouler, Pers. Prop.* pp. 352, 353. The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale, and known as a "warranty." *Reed v. Randall*, 29 N. Y. 358; *Iron Co. v. Pope*, 108 N. Y. 232, 236, 15 N. E. 335.

It is not now important to inquire how far, or under what circumstances, the principle stated by the learned judge applies to contracts of sale of goods in esse between dealers, in which there is an express warranty. It is not, we think, applicable to the obligation of a manufacturer who contracts, as in this case, for a sale of his own product, the condition of which he is presumed to know. It is plain that in the case at bar the plaintiffs intended to buy, and the defendant to sell, an article of refined petroleum, which should not only correspond to the description in the contract, but should be free from latent defects arising from the process of manufacture, so as to constitute a thing which, in the commercial sense, would be of some use or value. It is quite conceivable that the oil might correspond with all the descriptions of the contract, and yet be a useless and unmerchantable thing, in consequence of defects arising from the process of manufacture, in which case the buyer would have the shadow of the thing bought, without the substance. The defendant's obligation rests, not only upon the terms of the contract, but upon his superior knowledge and the confidence which the buyer placed in its ability to produce a proper article; and hence the relations of the parties are quite different from that of dealers in the article in the market, each possessing equal means of information

and opportunity for the detection of latent defects. A strict adherence to the bare descriptive words of the contract would not express the full obligation of the defendant. That the commodity shall be so free from latent defects arising from the process of refining, and which could be guarded against by ordinary care, so as to render it merchantable, is a term to be implied in all such contracts. *Story, Cont.* (4th Ed.) §§ 836, 837; *Jones v. Just*, L. R. 3 Q. B. 197. The plaintiffs were entitled to something more than the mere semblance or shadow of the thing designated in the contract. They were entitled to the thing itself, with all the essential qualities that rendered it valuable as an article of commerce, and free from such latent defects as would render it unmerchantable. *Mody v. Gregson*, L. R. 4 Exch. 49. If the goods in question were in fact unmerchantable, in consequence of latent defects arising from the process of manufacture, and which the defendant could have guarded against by the exercise of reasonable care, it would be quite unreasonable to hold that the defendant has, nevertheless, performed the contract, because it has delivered oil of the same brand, color, and test specified. It is quite clear that the words of the written contract do not exclude a liability on the part of the defendant for fraud in the performance, and it is difficult to see how it can affect an obligation of the seller, who is also a manufacturer, which is based upon his actual or presumed knowledge of latent defects in the oil, arising from the process of refinement. In the construction of commercial contracts for the sale and delivery of goods, the courts are not always bound by the literal meaning of words descriptive of the article, contained in the contract. It frequently happens, in large transactions, that the article which is the subject of the contract is described by some vague, generic word, which, taken strictly and literally, may be satisfied by a worthless or defective article. In such cases the words may mean more than their bare definition or literal meaning would imply, and impose upon the seller an obligation to furnish, not only the thing mentioned in the contract, but a merchantable article of that name. *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207. If it be true that the defendant in this case delivered alongside the vessel an article which was unmerchantable and unfit for transportation, in consequence of hidden latent defects arising from the process of manufacture, and of which it had, or should have had, knowledge, in the exercise of reasonable care, it has not, in any just or substantial sense, performed its contract, although the article so delivered was of the brand, color, test, and specific gravity called for by the writing. The plaintiffs were not only entitled to the thing described, but to that thing in such condition, and so free from hidden defects, as to make it available to them as an article of commerce, and fit for transportation.

Whether this liability survived the delivery and inspection of the goods remains to be considered. When the rules of the exchange are read into the contract, it is provided that the acceptance of the petroleum by the buyer's inspector shall be an acknowledgment that the goods are in accordance with the contract; and, as we have seen, the inspector so certified. The inspector was not the agent of either party, but an umpire selected to determine whether the article delivered alongside the Corby corresponded with the contract. The parties, in effect, submitted a certain question to the decision of the inspector, and that was whether the oil corresponded, in brand, color, and fire test, with the contract. He was not authorized to determine whether there was or was not any hidden or latent defects in the article at the time and place of the delivery which would render it unmerchantable. That question was not within the fair scope or purpose of the inspection, and the certificate on this point does not conclude the parties. If, however, the defects which the plaintiffs now claim existed at the time of delivery, and which they claim to have produced the damages, were discernible upon the inspection contemplated by the contract, they were not hidden or latent defects, within the meaning of the rule, and in that case the certificate would conclude the parties. If, in executing the power to determine the brand, color, fire test, and gravity of the article delivered, any other defect which would render it unmerchantable would necessarily appear, the plaintiffs are concluded as to that defect by the certificate of the inspector. *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243; *Pan Co. v. Remington*, 41 Hun, 218. If I am right in these several propositions, it must follow that the plaintiffs were entitled to prove upon the trial, if they could, that the refined petroleum delivered by the defendant alongside the Corby, though corresponding with the description of the article in the contract, had in it some hidden or latent defect, not discernible by the inspection provided for, which then and there rendered it unmerchantable.

At the trial the plaintiffs' counsel offered in evidence the judgment roll in the action against them by *Graham & Co.*, already referred to, as proof upon some of the issues in the case. He also offered to prove what actually took place at that trial, and what questions were actually litigated and submitted to the jury. The evidence was objected to by the counsel for the defendant, excluded by the court, and the plaintiffs' counsel excepted. We have seen that the defendant had knowledge of all the correspondence by cable between the plaintiffs and the parties in Calcutta, that it was notified of the commencement of the action, and that it participated in the trial. In so far as the issues actually litigated in that case are identical with the issues involved in this, the

judgment is binding upon the defendant, in the same way as if it had been a party upon the record. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 144 N. Y. 665, 39 N. E. 369; *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40, 45; *Andrews v. Gillespie*, 47 N. Y. 487; *Heiser v. Hatch*, 86 N. Y. 614; *Chicago City v. Robbins*, 2 Black, 418. What the plaintiffs sought to prove by this record was that, at the time of delivery of the petroleum by the defendant alongside the Corby, it was not properly refined, but contained water, acid, and other foreign substances that rendered it unmerchantable, and that, in consequence, they were cast in damages at the suit of the parties in Calcutta, the delivery in both cases being substantially identical in point of time and the amount of the damages. *Graham & Co.* could not have recovered against the plaintiffs for any change or deterioration in the oil after it was delivered, or that was due to the voyage or the perils of the sea, since the goods were at their risk. The plaintiffs offered to prove that the recovery did not proceed upon the ground of any express warranty, or any other ground embraced within the pleadings, other than the unmerchantable condition of the oil when delivered at the vessel. They were not confined to the record in order to show the point passed upon, but could show by parol proof what questions were actually litigated and decided. *Doty v. Brown*, 4 N. Y. 71; *Kerr v. Hays*, 35 N. Y. 231; *Bell v. Merrifield*, 109 N. Y. 211, 16 N. E. 55; *Adams v. Conover*, 87 N. Y. 429; *Smith v. Smith*, 79 N. Y. 634; *Lewis v. Pier Co.*, 125 N. Y. 348, 26 N. E. 301; *Shaw v. Broadbent*, 129 N. Y. 114; ¹ *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, Id. 606. It is quite true that the record would not prove that the defects were latent, or such as would not be disclosed by the inspection contemplated by the contract, since that question was not involved on the former trial, and the plaintiffs did not offer it for that purpose. It could not be excluded, however, because it did not prove the plaintiffs' entire case. If it proved any material fact in support of it, it was admissible. It did, we think, establish, as against the defendant, the fact that the oil, when delivered alongside the Corby, was unmerchantable, since that was the ground upon which the parties in Calcutta recovered the damages, as we must assume from the present condition of the record. The plaintiffs were, of course, bound to show by other proof that the defects which rendered the goods unmerchantable were latent, and such as would not be disclosed by the inspection.

The plaintiffs offered some proof at the trial tending to show that the defendant,

¹ 29 N. E. 238.

from the manner in which the goods were packed, as well as from other sources, knew the destination of the cargo in question, but it was objected to and excluded under exception. We think that the proof was admissible. It was a circumstance surrounding the transaction, not conflicting with the terms of the contract, and might have some bearing on the defendant's obligation to deliver an article of refined petroleum free from latent defects that would render it unmerchantable, and upon the degree of care that it was bound to use to that end. One of the qualities which the oil in question should possess was 44 degrees Beaume, specific gravity. This was introduced into the contract by the adoption of the rules of the exchange. It is quite possible that an article of commerce, such as petroleum, possessing all the qualities and sustaining all the tests specified in this contract, may be a merchantable commodity, according to the custom of the trade, irrespective of any other consideration, or of any latent defect. But that proposition is one of fact, rather than law; and, if true, it is difficult to see how a recovery could have been had, upon the grounds stated, by the parties in Calcutta. The defendant, having had an opportunity

to litigate that question once, may be bound by the result; but in any event it cannot be affirmed, as matter of law, upon the evidence in the record, that the article delivered was merchantable.

Our conclusions with respect to the questions in the case may be briefly summarized: (1) The defendant was bound to deliver an article of refined petroleum that was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement, or in the selection of the raw material, by reasonable care and skill. (2) This obligation survived the acceptance, if the latent defects were such as would not appear upon an inspection to ascertain whether the oil delivered corresponded with that described in the contract. (3) The judgment roll in the former action was admissible in evidence for the purpose and upon the ground already stated. (4) The plaintiffs were entitled to show that the defendant knew the destination of the cargo of oil designated in the contract. The judgment must therefore be reversed, and a new trial granted; costs to abide the event. All concur. Judgment reversed.

CRAFT v. PARKER, WEBB & CO.

(55 N. W. 812, 96 Mich. 245.)

Supreme Court of Michigan. June 30, 1893.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by Ezra Craft against Parker, Webb & Co., a corporation, for negligence in selling spoiled meat which made plaintiff sick. Judgment for defendant, and plaintiff appeals. Reversed.

Sloan, Moore & Duffie, for appellant. Willard M. Lillibridge, for appellee.

LONG, J. Plaintiff brought suit in an action on the case for negligence in selling a piece of rolled spiced bacon, which he alleges was spoiled, and unfit for food, and from the effects of which he became sick. The court below directed verdict in favor of defendants, on the ground that there was no negligence shown on the part of the defendants, and also that the plaintiff was guilty of contributory negligence.

We think the case should have gone to the jury. Defendants carry on a wholesale and retail business of selling meats in the city of Detroit. On July 8, 1891, plaintiff's brother bought from them, at the retail counter, a roll of spiced bacon. It was taken to the plaintiff's house, where he boarded, and part of it cooked for breakfast. Plaintiff's brother had the first slice, which seemed to be all right. Later in the morning, plaintiff's wife cut off some more from the roll, and cooked it for plaintiff. The wife noticed a peculiar odor from it, but claims she thought it was the spices. Plaintiff also noticed the odor, and a peculiar taste, and claims that he also thought it was the spices. Soon after eating it he became quite sick. He sent for a physician, who pronounced that he was suffering from some kind of poison. Plaintiff then examined the balance of the meat, opened it, and says that it was very rank, and the smell of it was like that of a carcass. A witness for plaintiff also testified that a short time previous to that she purchased some spiced bacon of defendants, cooked it, and her husband became sick. She opened that roll, and found it spoiled. She returned it to one of the clerks at the retail counter, and told him of its condition. He took it back, and gave her other meat in its place. John Stabler, a witness for plaintiff, testified that he had worked for defendants, but left their employ just before this meat was sold. He testified that he had seen old pickle drippings from the upper floor upon bacon piled upon a lower floor, and that defendants' foreman had the bacon removed; that some rolls of

bacon were badly molded, and the foreman directed that they should be taken to the smokehouse, and smoked over again. Robert Craft, a brother of the plaintiff, had worked for defendants, and was in their employ at the time the bacon was sold to plaintiff. He was asked: "Do you know of any spoiled meats that were sold there, over the counter, during the month of July, about the time you procured this piece of spiced bacon that was put on the counter there for sale for private consumption, in the regular course of their business, and that was unfit for food, being spoiled and discolored?" Under defendants' objection, the witness was not permitted to answer. John Stabler was also asked: "What can you say as to whether or not you have seen meat that was spoiled, and unfit for use, prepared in this place to be sold on the market about last summer, or the early part of last winter?" This was also ruled out. The answers to these questions should have been permitted. The question to Mr. Craft fixed the time the sale was made to plaintiff, and, with some testimony fixing the keeping for sale of spoiled meats at about that time, the plaintiff should have been permitted to show other meat kept for sale prior to that time. The defendants were keepers of a retail meat market, engaged in the business of selling meats for food, and were bound to use due care to see that the meats were fit for human consumption. *Hoover v. Peters*, 18 Mich. 51. It was proposed to be shown, however, that they were not only careless in preparing their meats, but their servants had actual knowledge of the unfitness of the meat for food, and yet sold it.

It was a question for the jury whether the defendants were so careless that they should be held responsible for the consequences of their own acts, or the acts of their servants. A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold. If, in addition to this implied warranty, it is found that he was negligent in selling meats that were dangerous to those who ate them, he would be liable for the consequences of his act, if he knew it to be dangerous, or, by proper care on his part, could have known its condition. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. Rep. 154. These are questions for the jury, and not for the court.

The question is also for the jury to determine, whether the plaintiff exercised due care on his part in partaking of the meat when he observed the odors arising from it after it was cooked. The judgment must be reversed, and a new trial ordered. The other justices concurred.

LEITCH v. GILLETTE HERZOG
MANUFACTG CO.

(67 N. W. 352.)

Supreme Court of Minnesota. May 19, 1896.

Appeal from municipal court of Minneapolis; Andrew Holt, Judge.

Action by George T. Leitch, doing business as the Malleable Iron Works, against the Gillette-Herzog Manufacturing Company. Judgment for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

Booth & Douglas, for appellant. Jas. D. Shearer, for respondent.

START, C. J. This was an action to recover a balance of \$443.10 of the contract price of 500 iron bedsteads manufactured by the plaintiff for the defendant. The contract, as the trial court found it, was that the plaintiff agreed to manufacture for the defendant 500 iron bedsteads, for which the defendant agreed to pay the plaintiff \$5.60 each. It was expressly agreed by the parties that such beds should be in accordance with a certain sample bed then furnished by the defendant to the plaintiff, except as to certain additions and changes not here material. It was also agreed that the beds should be inspected and approved by defendant, at plaintiff's factory, before the same were loaded on the cars. The defendant, by its answer, admitted the making of this contract, but further alleged, by way of a counterclaim, that the plaintiff specially warranted that the beds so to be manufactured by it should be like the sample furnished (except as to the stipulated changes), and warranted that, if one of the beds would go together, they all would,—that is, that the several parts of the beds were interchangeable; that the beds were inspected at the plaintiff's factory, and appeared and seemed to be in accordance with the contract in all respects, and that, relying on the plaintiff's statement that the beds and parts thereof were interchangeable, the defendant accepted the beds, and shipped them to New Orleans, to fill a contract it there had for beds; that the beds were not constructed in accordance with the sample bed or the contract; that the defects were latent, and not possible of discovery, except by putting together each and every one of the beds; that on discovering the defects, after the beds arrived in New Orleans, the defendant notified the plaintiff of the defects in the beds; that the beds as manufactured were of no value. The reply put in issue the new matter alleged in the answer, and affirmatively alleged that the beds were in fact made in every way according to the contract. The trial court made its findings of fact, and directed judgment for the plaintiff for the full amount claimed. The defendant appealed from an order denying its motion for a new trial.

The findings of the trial court as to the

defects in the beds, and wherein they differed from the sample beds, the inspection of the beds by the defendant, and its damages, are in these words: "That plaintiff made said beds, especially the male and female castings thereon, from the same pattern, and with the intention that any one of the male castings on the bed rails should go into and fit any one of the female castings on the bed posts, or, in other words, be interchangeable, and had also stated to defendant, but I do not find that he made any special warranty to that effect to defendant. That said beds, when inspected at plaintiff's works, at St. Louis Park, by defendant, appeared and seemed to be like the sample beds, referred to in the pleadings; but that when said beds arrived at New Orleans, and defendant attempted to put them together, it was found that the male castings were too large for the female castings, and that the braces were of unequal length, and would not fit. That in more than four hundred of said five hundred beds said castings did not go together, and defendant had to expend large sums of money in remedying said defects; and that, by reason of said defects, said beds were worth more than seven hundred and fifty dollars less than if said beds had been of the same kind as the sample bed in said respect, and said defects had not existed. That defendant's agent, in inspecting said beds, when delivered to defendant on board the cars at St. Louis Park, only set up one or two of said beds. That if he had inspected the beds properly, and tried some more of the castings and braces, he could not have avoided discovering the defects. That plaintiff did not in any way mislead or dissuade defendant's agent from making a thorough inspection of the beds, and did not know of the said defects. That plaintiff, when notified of the defects, refused to remedy the same." The defendant assigns as error, among others, that the court erred in finding that the plaintiff did not specially warrant that the parts of the beds were interchangeable; in finding that, if defendant had properly inspected the beds, it could have discovered the defects in the beds; and in finding, as a conclusion of law, that the plaintiff was entitled to judgment for the full amount of his claim.

It is not material in this case whether the plaintiff specially warranted that the parts of the beds were interchangeable or not, for it was the express contract of the parties that the beds should be like the sample bed; and if they were not like it, as to all substantial matters, not otherwise stipulated in the contract, there was a breach of the plaintiff's contract, and the defendant is entitled to recover damages on account of the breach, unless it waived it by an acceptance of the beds.

The undisputed evidence shows, and such is substantially the finding of the court, that the plaintiff expressly agreed to manufacture for the defendant 500 iron beds, to be equal

to the sample furnished, in all respects, except as to the changes already referred to. This is a warranty that the beds should be like the sample one, for it is just what the plaintiff expressly agreed that he would do. It is not necessary that the word "warranty" should be used in order to create an express warranty. It is enough if the words actually used import an undertaking that the subject-matter of the sale shall be as represented. Here the express undertaking was that the subject-matter of the contract should be like the sample. But this was not the entire contract, for it was further agreed that the beds should be inspected and approved by defendant at plaintiff's factory, before they were placed on the cars. It is claimed by the plaintiff that this last provision so qualifies his undertaking that the beds should be like the sample that no claim for a breach of the undertaking or warranty would survive an inspection and approval of the beds by the defendant. On the other hand, the defendant claims that the stipulation in the contract as to inspection and approval was for its benefit, and was intended to give it the right of protecting itself both by warranty and an inspection; that the right to inspect the beds before acceptance was simply a cumulative remedy. If this is a correct construction of the contract, it would follow that the defendant might accept the bedsteads, and rely on the warranty. *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51. But the contract cannot be so construed, for the agreement that the beds should be inspected and approved by the defendant at the factory was for the benefit of both parties, and was of special importance to the plaintiff; for if it was found, on such inspection, that the beds in any respect were not like the sample one, the defects could be remedied with less expense and loss to the plaintiff than could be done after the beds were accepted and shipped away by the defendant. After an inspection and approval of the beds by the defendant, its right to recover damages for the breach of plaintiff's warranty was limited to such defects not existing in the sample as were not apparent upon a reasonable inspection of the beds. The evidence as to whether the parts of the sample beds were interchangeable is somewhat conflicting, but there is no claim that the different parts of the sample did not fit and go together, and the trial court found that the defects which it found to exist in the plaintiff's beds did not exist in the sample bed. The defects in the beds found by the court resulted from the fact that the several parts of the beds were not interchangeable, and, as a consequence, in more than 400 of the 500 beds the castings would not go together; and for this reason the beds were worth, as the court found, \$750 less than if the beds

had been of the same kind as the sample bed, and the defects had not existed.

It is evident that the trial court's conclusion of law that the plaintiff was entitled to recover the entire balance of the contract price, without any deductions for the damages which the defendant had sustained, was based on its finding of fact that the defects in the beds were obvious upon a reasonable inspection. The defendant was only bound to make a reasonable inspection of the beds. What is reasonable in a given case depends upon its particular circumstances, and in this case we are of the opinion that the evidence shows that the defendant made a reasonable inspection of the beds, and that the finding of the trial court to the effect that, if it had properly inspected the beds, the defects would have been discovered, is not sustained by the evidence. It is true that if the defendant had set up, or attempted to do so, the whole 500 beds, it would have found that 400 of them were misfits (if they were so in fact), and might have rejected the defective ones. It is also true that the defendant might have discovered that the parts of the beds were not interchangeable by trying to set up a very much less number of the beds. This is apparent from the defendant's own evidence. But the question is whether the defendant was bound, under the special circumstances of this case, to do more than it did in order to discover whether the different parts of the beds would go together. It appears from the evidence that each bed consisted of 13 separate parts, and there were to be manufactured 500 beds exactly alike. Now, the fact (which is so well known that we may take notice of it) that manufacturers in such cases make the several parts of the articles or machines to be manufactured duplicates of each other, or interchangeable; the admitted fact that the plaintiff told the defendant's inspector that, if one of the beds went together, they would all go together; and the further fact that he did set up one or more beds, and found that the parts went together properly,—do not justify a finding that he did not make a proper inspection. The inspector having applied the test suggested by the manufacturer, who was bound to know whether the several parts were interchangeable, if he said anything about the matter, and found that the parts and castings fitted in one bed, he had a right to rely on the plaintiff's statement that all of the beds would go together in the same way, or, in other words, that the several parts were interchangeable. He was not, therefore, bound to further examine and experiment with the 6,500 parts of which the beds were composed, to ascertain if all the beds would go together. Order reversed, and a new trial granted.

BRADFORD v. MANLY.

(13 Mass. 139.)

Supreme Judicial Court of Massachusetts.
Suffolk, March Term, 1816.

Assumpsit on divers special counts, to recover the difference in value between two casks of cloves, alleged to be sold by sample to the plaintiff, and the cloves actually delivered in virtue of the sale. At the trial, which was had on the general issue, before the chief justice, at the last November term in this county, the plaintiff produced a bill of parcels of 602 pounds of cloves at one dollar fifty cents per pound, on which payment was acknowledged by the defendant to have been received in the plaintiff's note payable in sixty days. He then produced a witness, who testified that on the 4th of January, 1814, the defendant came to the plaintiff's store, with a sample of cloves in a paper, and asked the plaintiff if he wished to purchase some cloves. The witness examined the sample, and found the cloves to be of the best quality of Cayenne cloves; and the defendant said, at a subsequent time, that the sample he showed was of fair cloves. On the same day that the purchase was made and the bill of parcels given, the casks were removed to the plaintiff's store, the price being that of cloves of the best quality.

It was in evidence, that the sample was not taken from the casks sold, but from an open barrel, out of which those casks had been filled, they not being before quite full; but the defendant did not know from whence the sample came. The market price of this article having fallen immediately after the sale, the plaintiff made no attempt to sell the cloves; and the casks were not opened, until May, 1815, when there being some application for the purchase of them, they were opened, and were found to contain a mixture of Cayenne cloves and an inferior and distinct species of the same article, the growth of the East Indies, in the proportion of one-third of the latter, which was worth from a fifth to a quarter less than the former. Whether the casks had been opened, or exposed, or mixed, while in possession of the plaintiff, were questions duly submitted to the jury. Before instituting this suit, and after the defect was discovered, the plaintiff offered to return the cloves, but the offer was not accepted. The defendant objected to the admission of any evidence, other than the bill of parcels, (which was of cloves generally without designating the kind,) to prove that any distinct species or quality of the article was sold. But the objection was overruled, and the jury were instructed that, although no fraud was proved or suggested, and no express warranty, other than what might be inferred from the exhibition of the sample, was proved; yet if they believed from the evidence, that the purchase was made upon the confidence that the whole quantity was represented by the sample; and that it was the intention of the defendant so to represent by exhibiting the sample; and that the article, when sold and delivered, was materially differ-

ent in quality and value from that which was shown in the sample; they ought to find a verdict for the plaintiff, and assess in damages the difference in value at the time of the sale. The jury returned a verdict for the plaintiff, having found the facts specially as above stated, and having also found that there was no fraud in the sale on the part of the defendant. The defendant excepted against the direction of the judge, and moved for a new trial on that ground, and also on account of the admission of parol evidence to prove the contract.

Davis, Sol. Gen., and Thatcher, for plaintiff.
Shaw, for defendant.

PARKER, C. J., delivered the opinion of the court. The first point taken by the defendant's counsel is, that parol evidence was admitted, to control or explain the contract in writing, which subsisted between the parties.

The objection goes upon the supposition that a common bill of parcels, given upon or after the purchase of goods, is evidence, and the only proper evidence of such a contract. But it is not so. The bargain is usually made verbally, and without any intention that it shall be put in writing; and the bill of parcels is intended only to show that the goods have been purchased and paid for. It is seldom particular, or descriptive of the whole contract between the parties. But if it were not so, the paper introduced in this case is ambiguous with respect to the subject of the bargain; and the ambiguity is latent, so that parol evidence may be admitted to explain it. It states only that "2 casks of cloves" were purchased; leaving it uncertain what kind of cloves, of which it appears in the case that there are at least two kinds, differing materially in quality and value. We think this objection was properly overruled.

We may then come to the principal question, viz. Whether the evidence in the cause proved a contract to sell cloves of a different kind from those which were delivered. The defendant exhibited a sample, by which the plaintiff purchased. Among fair dealers there could be no question but the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party, who had been deceived in a purchase so made.

The objection is, that no action upon a warranty can be maintained, unless the warranty is express; and that no other action can be maintained, unless there be a false affirmation respecting the quality of the article. If such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold.

The authorities cited by the defendant's counsel have been carefully looked into; and we think they do not militate with this decision; unless it be the case of the bezoar stone (*Chandelor v. Lopus*, Cro. Jac. 4, Dyer, 75), which we think would not now be received as

law in England; certainly not in our country. The vendor sold the stone as and for a bezoar stone, to one unacquainted with such articles, and it turned out to be of inferior value. The court held that no action would lie; and some of the judges stated that even if the vendor had known that it was not a bezoar, and it had been so alleged, an action could not be maintained without an express warranty. The other case is that of *Parkinson v. Lee*, 2 East, 314. There the hops sold were of the same kind and quality as the sample; but there was an unknown deterioration by fermentation, caused by the grower of the hops, and not by the vendor. Hops being usually sold in pockets, and the quality ascertained by sample, it was held that the innocent vendor was not responsible to the vendee, for an unknown inherent defect, without an express warranty. That case does not militate with our opinion in the case at bar.

The fair import of the exhibition of a sample is, that the article proposed to be sold is like that which is shown as a parcel of the article; it is intended to save the purchaser the trouble of examining the whole quantity. It certainly means as much as this, "The thing I offer to sell is of the same kind, and essentially of the same quality, as the specimen I give you." I do not know that it would be going too far to say that it amounts to a declaration, that it is equally sound and good. But it is not necessary to go so far in the present case; and we are not disposed to question the correctness of the decision in *Parkinson v. Lee*.

It is expressly found by the jury in the case at bar, that the cloves delivered were different in kind from those which composed the sample, and inferior in value, not from decay or exposure; but that there is a specific difference in the respective plants from which they are produced. Surely if a man were to exhibit to me a parcel of hyson tea as a sample, to induce me to buy a chest, and I should pay him the price of hyson, and he should deliver me a chest of bohea or souchong; I might recover the difference in value, if he should refuse to do me justice, although he did not expressly warrant that the tea in the chest was the same as that in the sample. Indeed the exhibition of the sample must, in all fair dealing, stand in lieu of a warranty or affirmation. It is a silent, symbolical warranty, perfectly understood by the parties, and adopted and used for the convenience of trade.

The cases must be very strong, to establish a principle so unjust, and so productive of dis-

trust and jealousy among traders, as that contended for by defendant's counsel. For what purpose is the sample exhibited, unless it is intended as a representative of the thing to be sold? What would an honourable merchant say if, when he took from a mass of sugar or coffee a small parcel, and offered to sell by it, the man who was dealing with him, should ask him if it was a fair sample, and call upon him to warrant it so? Mercantile honour would instantly take the alarm; and if such questions should become necessary, there would be no need of that honour, which happily is now general and almost universally relied upon. That there is not an unknown and invisible defect, owing to natural causes, or to previous management by some former dealer, he may not be presumed to affirm when he shows the sample; and as to these particulars an express warranty may be required, consistently with confidence in the fair dealing of the vendor. But that the thing is the same, generically and specifically, as that which he shows for it, he certainly undertakes, and if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him.

A case similar to this in principle came before me two or three years ago at nisi prius. An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas cocoa. The plaintiff made a purchase of a considerable quantity, and shipped it to Spain; having examined it at the store before he purchased; but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it, there was a considerable difference in value, in favor of the Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I held that the advertisement was equal to an express warranty; and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question; but afterwards abandoned it, and suffered judgment to go. Surely if a sample of Caraccas cocoa had been shown to the purchaser, and any other cocoa had been delivered to him, the case would not have been less strong.

We are all decidedly of the opinion, that a sale by sample is tantamount to an express warranty that the sample is a true representative of the kind. There must therefore be entered judgment according to the verdict.

CHAPMAN v. MURCH.

(19 Johns, 290.)

Supreme Court of New York. Jan. Term.
1822.

In error to the court of common pleas of Washington county, Chapman brought an action of assumpsit against Murch in the court below. The declaration stated, that the defendant, on the 1st of December, 1818, in consideration that the plaintiff would deliver to the defendant, a certain horse of the plaintiff of great value, in exchange for a certain horse of the defendant, the defendant undertook and promised, that the horse of the defendant was then and there sound, &c.; that the plaintiff, confiding in the said promise of the defendant, delivered to him the said horse of the plaintiff, in exchange for the defendant's horse, &c. Yet the defendant, &c. fraudulently, &c. did not perform or regard his said promise, &c., for that the horse of the defendant was not sound, but, on the contrary, was unsound, and had a certain disease, called the yellow water, of which he afterwards, to wit, on the 2d day of December, 1818, died, whereby, &c. The defendant pleaded the general issue, and on the trial of the cause, the plaintiff offered to prove, that the parties exchanged horses: that the plaintiff let the defendant have a horse worth 100 dollars, in consideration of which the defendant let the plaintiff have another horse, which the defendant, at the time, represented to be sound: that the horse of the defendant, so delivered to him in exchange, was not sound, but that he had the disease, called the yellow water, which rendered him useless and of no value, and that he died the next day. The evidence so offered was objected to by the defendant's counsel, and rejected by the court, on the ground, that this being an action of assumpsit founded on a warranty of the soundness of the horse, the plaintiff, in order to entitle himself to a recovery, was bound to prove an express warranty, and that the testimony offered by the plaintiff did not amount to such a warranty. A bill

of exceptions was taken to the opinion of the court, on which the writ of error was brought. The case was submitted to the court without argument, on a statement of the points and authorities.

SPENCER, C. J., delivered the opinion of the court. In the various cases which have been cited, it appears, abundantly, that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it nowhere appears, that it is necessary that the vender should use the express words, that he warranted the soundness. If a man should say, on the sale of a horse, "I promise you the horse is sound," it is difficult to conceive, that this is not a warranty, and an express one too. Peake (on Evid. 228) says, "in an action on a warranty, the plaintiff must prove the sale and warranty." "In general, (he says,) any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount to a warranty." He adds, "but where the defendant refers to any document, or to his belief only, in such cases no action is maintainable, without proof, that he knew he was representing a falsehood." In every action on a warranty, it must be shown that there was an express and direct affirmation of the quality and condition of the thing sold, as contradistinguished from opinion, &c., and when that is made out, it would be an anomaly to require that the word warrant should be used. Any words of equivalent import, showing the intention of the parties, that there should be a warranty, will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the court. *Seixas v. Woods*, 2 Caines, 56; *Pasley v. Freeman*, 3 Term R. 57; *Cramer v. Bradshaw*, 10 Johns, 484.

The judgment must be reversed, and a venire de novo awarded to the court below.

Judgment reversed.

GRIEB v. COLE.

(27 N. W. 579, 60 Mich. 397.)

Supreme Court of Michigan. April 8, 1886.

Error to circuit court, St. Clair county; Stevens, Judge.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

George P. Voorheis, for appellant. Chadwick & Wood, for plaintiff.

CHAMPLIN, J. On May 1, 1883, one W. D. McLaughlin, as agent for plaintiff, took from the defendant the following order: "Gratiot, Mich., May 2, 1883. To Charles Grieb, Port Huron, Mich.: You will please ship me, on or about the first day of June, 1883, one Buckeye light mower, to Port Huron, for which I agree to pay you \$77, in manner as follows, (reserving, however, the full benefit of the warranty hereon indorsed;) \$35 cash, with freight from Port Huron, on delivery, and execute approved notes as follows: \$35, payable on the first day of January, 1884, with interest at 7 per cent, from delivery; \$42, payable on the first day of January, 1885, with interest at 7 per cent, from delivery; \$—, payable on the — day of —, 188—, with interest at 7 per cent, from delivery. For the purpose of obtaining credit for the above, I certify that I own, in my own name, — acres of land in the township of Gratiot, county of St. Clair, and state of Michigan, of which 80 acres are improved, and the whole worth, at a fair valuation, \$5,000 over and above all incumbrances, liabilities, and legal exemptions. It is not incumbered, except 1,000 dollars, and the title is perfect. I also own \$500 worth of personal property over and above all indebtedness, and not exempt from execution by law. P. O. address, Port Huron. Taken

by W. D. McLaughlin, Agent. Chas. X Cole,"
his
mark

—across the back of which was printed a blank warranty, with Grieb's printed name appended, as follows: "Whereas, Mr. — has this day given us his order for a —, we hereby agree, in consideration of said order and the faithful performance of the conditions herein mentioned, to warrant said — one year to be good and well made, and to do as good work as any other machine of its class. It is an express condition of this warranty that the directions for using this machine shall be faithfully followed, and if for any reason it fails to perform as warranted, immediate notice of the same must be communicated to the agent to whom the order is given, and if said agent should fail to make the machine perform as warranted, it may be returned, and money or note refunded. And it is also agreed, should the machine be used from day to day or at intervals, or set aside before or after use, without giving said agent notice, then, in either of said cases, it shall be conclusive evidence that the machine is ac-

cepted and the warrant is at an end. Dated —. Charles Grieb." The agent delivered this so-called "order" to the plaintiff, who claims that he accepted it, and delivered to the defendant the said machine on the eighteenth day of July, 1883, but the defendant has neither paid for said machine, nor executed and delivered the notes; and after the time expired when the note for \$35 mentioned in the order would have matured, had it been executed, the plaintiff brought suit in justice's court to recover the amount claimed to be due at that time. The plaintiff's declaration was in writing, and, besides the common counts in assumpsit, contained a special count, setting out the substance of the above order, and alleging a delivery of the machine ordered. The plea was the general issue.

It is always proper, in construing a contract, to take into consideration the position which the parties occupied, and the circumstances under which the agreement was entered into. The plaintiff resided at Port Huron, and was engaged in the business of supplying mowing-machines to farmers. He was not a manufacturer, but took written orders, and purchased the machines to fill such orders. Defendant is a farmer, residing in the vicinity of Port Huron, and on the second day of May, 1883, signed the order above set out, and delivered it to plaintiff's agent. On the trial the plaintiff offered in evidence the aforesaid order, and warranty thereon indorsed; to which the defendant objected because not admissible under the declaration, and as immaterial to the issue. The objection was overruled, and this constitutes defendant's first assignment of error. This objection is based upon the idea that the paper is incomplete; that the order refers to the warranty on the back, and reserves the full benefit of such warranty, and it appears that the blanks in the warranty were not filled out; and it is claimed, and I think rightly, that the warranty indorsed must be of such legal validity as to support an action thereon by Cole in case of a breach thereof.

By reference to the warranty indorsed, it will be observed that the name of Mr. Cole, and the description of the machine ordered, are omitted, as well as the date. If the warranty stood alone, there could be no doubt that it would be so far incomplete as to render it invalid, because thus standing it lacks the essential qualities of naming the party to be indemnified and the subject-matter. It does not appear from it whether the machine is a steam-thresher or a mowing-machine. But the reference in the order to the warranty indorsed thereon constituted the order and warranty one instrument, and when read together, no ambiguity or uncertainty appears. The party to whom the warranty is made is the party making the order, and the machine is the machine described in the order, and the date of the order supplies the date to the warranty, for they are contemporaneous, and the warranty has the

same force and effect as if embodied in the order itself. The warrantor is bound by the printed signature which he adopts as his as fully as if it was in his handwriting. The order and warranty were properly admitted in evidence at that stage of the case.

The plaintiff gave evidence tending to show that he had complied with the contract on his part, and had delivered the machine at Port Huron within the terms and meaning of the contract, and also had requested defendant to execute the notes, and that defendant declined to accept such delivery, or to execute and deliver the notes. The fact of delivery was controverted by defendant. The defendant also offered testimony tending to show that the mower which plaintiff claimed to have delivered to defendant was a second-hand machine, showing considerable wear; that the worn parts had been stripped and filled with paint in the wood-work, and parts of it had been painted over after having been used and worn; that the axles had old grease upon them, one set of knives were chipped and broken, and the tongue and neck-yoke considerably worn; that the entire machine had been used one season somewhat; but the court, on objection of plaintiff's counsel, excluded this evidence as not admissible under the plea, and not tending to show the condition of the machine when delivered. The latter portion of this ruling was based upon the fact that the witnesses by whom these facts were sought to be proved did not make the examination of the machine until after the trial in the justice's court in April, 1884. The evidence, however, showed that on the twenty-first of July, 1883, which was three days after plain-

tiff claims to have sent the machine to defendant's farm and demanded the notes, defendant gave written notice to plaintiff that he refused to purchase it, and that it was there at plaintiff's risk, and to come and take it away, and the testimony was that it had not been used since. There was therefore no reason for excluding the testimony on this ground.

The court erred also in excluding the evidence upon the other ground stated. It was proper for the defendant, under the plea of the general issue, to prove that the article delivered was not the article he purchased. He did not order or purchase a second-hand mowing machine, or one that had been in use and worn; but the order, taken in connection with the circumstances under which it was made, called for a new machine. A purchase of a machine from a dealer implies that the machine sold shall be new,—that is, not second-hand, or the worse for wear,—and under such an order the dealer could not impose upon the purchaser a second-hand and worn article, whether it complied with the terms of the warranty or not, as to being good and well made, and will do as good work, as any other machine of its class. This evidence, if believed, fairly met and rebutted the plaintiff's case, and tended directly to sustain the defendant's plea, which put in issue each and every allegation of the plaintiff's declaration. *Rodman v. Guilford*, 112 Mass. 405.

The judgment must be reversed, and a new trial ordered.

CAMPBELL, C. J., and MORSE, J., concurred. SHERWOOD, J., did not sit.

MURPHY v. MCGRAW.

(41 N. W. 917. 74 Mich. 318.)

Supreme Court of Michigan. Feb. 20, 1889.

Error to circuit court, Bay county; GAGE, Judge.

Action by Albert H. Murphy against Frank S. McGraw. Judgment for plaintiff, and defendant brings error.

Simonsen, Gillett & Courtright, for appellant. *T. A. E. & J. C. Weadock*, for appellee.

LONG, J. This action is brought to recover money paid by plaintiff to defendant for a horse, and money expended by plaintiff in attempting to cure the horse of disease. Plaintiff had a verdict and judgment in the court below for \$601.50. Defendant brings error.

The declaration is upon the common counts in *assumpsit*, to which are added two special counts, setting out the purchase and sale of the horse under a warranty that he was sound, straight, and all right, and just such a horse as plaintiff wanted, and met all the requirements stated by plaintiff to defendant prior to the purchase, alleging a breach of the warranty, and that the horse was of no value whatever at the time of the purchase. In the first special count plaintiff alleges that on the 10th day of March, 1887, defendant sold him a horse for \$400, and promised that the horse was sound and without a blemish, and under 6 years of age; and further promised that if the horse should prove unsound defendant would, on the return of the same, repay the purchase price; and that the horse was 12 years old and was unsound and blemished; and on November 18, 1887, he returned the horse to defendant, who received the same, and hath wholly refused to repay said sum of money. The second special count is as follows: "And also for that, whereas, on or before the 10th day of March, 1887, the said defendant was the owner and in possession of a certain horse which he was offering for sale, and one A. T. Miller was an employe of defendant for hire, and was then and there in charge of defendant's stables and of said horse, as such employe, and said plaintiff, being desirous of purchasing a sound, speedy, and healthy horse for his own use, the said defendant represented said horse to be such an one as above described, and such as plaintiff desired to purchase. Said plaintiff, when examining said horse, noticed some slight marks and abrasions of the skin on said horse's legs and feet, and upon which some medicine had been used, and, calling the attention of said defendant to the same, he was assured by said defendant and said Miller, in the presence and hearing of said defendant, that said abrasions and marks were caused by a slight attack of scratches, a common and comparatively harmless complaint; and said plaintiff, relying on said assurances so given by said defendant, thereupon bought said horse, and paid to said defendant the sum of four hundred dollars in lawful money for said horse, which sum would be his value if he

was sound and such a horse as defendant represented him to be. After said plaintiff took possession of said horse, said malady became very much worse, notwithstanding the fact that said horse received the best possible care and medical treatment; and what was represented by said defendant and said Miller, his employe as aforesaid, to be a temporary and harmless blemish was really, at the time said horse was sold to plaintiff, and for months prior thereto had been, and still is, a loathsome, incurable, and serious disease of the skin, rendering said horse worthless, all of which the said defendant, before and at the time he sold said horse to plaintiff, well knew; whereupon said plaintiff informed said defendant of the condition of said horse, on or about the 15th day of March, 1887, and kept him informed from time to time of the aforesaid condition of said horse, and said defendant, when so informed of the disease, blemish, and unsoundness aforesaid, still claimed that said disease was curable, and requested plaintiff to continue having said horse treated medically, which said plaintiff then and there did, notwithstanding which care and medical treatment said horse did not improve or recover from said disease, and plaintiff, on or about the 19th day of November, 1887, returned said horse in the same condition in which he received him to said defendant," etc. This count then alleges a promise to repay the money so paid for said horse, and a refusal to repay the same.

Plaintiff also filed a bill of particulars in the case under the common counts, as follows: To cash received by defendant for the use of plaintiff, \$400; interest on the same, \$28; cash expended for medicine, care, and maintenance of the horse from March 10 to November 19, 1887, \$300; cash paid for freight for conveying said horse from Bay City to Detroit, and from Detroit to Bay City, \$50; total, \$778. The plea is the general issue.

After the jury were sworn in the case, defendant's counsel objected to the introduction of any testimony, on the grounds: (1) That the declaration did not state a cause of action. (2) That the second count, being a count in tort, cannot be joined with the first count, which is a count in *assumpsit*, and that the plaintiff elect upon which count he will proceed. (3) That the two counts, if they are in *assumpsit*, are inconsistent with each other, and the plaintiff should elect upon which he will proceed: the first being on express contract, and the second on an implied one. The court very properly overruled these objections. These counts are in *assumpsit* to recover back the money which plaintiff claims defendant obtained from him without consideration, by the sale of a horse which plaintiff contends was wholly worthless, and which he purchased upon the warranty of defendant that it was sound, straight, and all right, and just such a horse as plaintiff wanted. The first special count alleges the warranty, and its breach. The second special count alleges the warranty, and sets out with much particularity the condition of the horse

at the time of the purchase; the representation then made by the defendant and his employe as to the condition of the horse, and assurances that the marks or abrasions were scratches, a common and comparatively harmless complaint; the reliance of the plaintiff upon these representations; and the fact that with the best care and medical treatment what was represented to be scratches proved to be, and is, a loathsome and incurable disease, rendering the horse worthless. These two counts in the declaration each state a cause of action, and are not inconsistent, and the court very properly refused to compel the plaintiff to elect under which he would proceed. The first count is in *assumpsit* for a breach of the warranty in the sale. The second is in *assumpsit* for the recovery of money paid without consideration; setting up the circumstances under which it was obtained, and that the horse purchased was absolutely without value. The question whether upon a breach of the warranty a right existed to return the property, is one of law; and, as there was no acceptance of the return, if that right did not exist, then the averment of return offered was surplusage, and left the special counts as if it had been omitted, and the claim of too much would not vitiate the rest. *Manufacturing Co. v. Vroman*, 35 Mich. 325. Even if these special counts had not been added, under the circumstances shown upon the trial and claim made the plaintiff might have recovered under the common counts alone. If, as it is claimed by the plaintiff, the horse was of no value whatever, then the defendant had obtained \$400 of plaintiff's money without consideration, which, in equity and good conscience, he ought to repay; and in the language of Lord ELLENBOROUGH in *Hudson v. Robinson*, 4 Maule & S. 475, 478: "An action for money had and received is maintainable whenever the money of one man has without consideration got into the pocket of another;" and, whether the recovery was asked on the special or general counts, the same facts had to be relied on by the plaintiff, and the same defense made. Under the theory of the case the plaintiff could only recover upon the ground that the money was paid without consideration, and a recovery in such a case may be had on the common counts in *assumpsit*. *Bearislee v. Horton*, 3 Mich. 560; *Petersen v. Lumber Co.*, 51 Mich. 86, 16 N. W. Rep. 243; *Phippen v. Morehouse*, 50 Mich. 537, 15 N. W. Rep. 895; *Lockwood v. Kelsea*, 41 N. H. 186; *Grannis v. Hooker*, 29 Wis. 65; *Lane v. Boom Co.*, 62 Mich. 63, 28 N. W. Rep. 786; *Nugent v. Teachout*, 35 N. W. Rep. 254.

Counsel for defendant has devoted much space in his brief to the consideration of the question that when there is a warranty as to quality on the sale of goods, but no fraud, and no stipulation that the goods may be returned though the warranty be broken, the vendee cannot rescind the contract without the consent of the vendor; that a breach of warranty alone will not justify a return.

This may be conceded as well settled as a general proposition, but there may be cases where a purchaser, without returning an article, may yet be allowed to recover its cost. The declaration alleges that the defendant represented the horse as sound, straight, and all right, just such a horse as the plaintiff wanted. These representations amounted to a warranty. The claim made on the trial by the plaintiff was that about the 1st of March, 1887, he went to the farm where the horse was kept, with the defendant, and told him what kind of a horse he wanted; that he wanted a good, prompt, driving horse,—one that would go,—when defendant said he had one that would fill the bill. The defendant, showing the horse in question to the plaintiff, said it was six years old, and was straight, and all right. The farm was some three miles out from the city of Bay City. The horse was in charge of Mr. Miller, who hitched him up, and plaintiff, defendant, and Miller got in, and, Miller driving, the parties came to the Frazer House, in the city, and, as plaintiff says, "We came down to the Frazer House about as fast I ever drove in my life." Arriving at the Frazer House, plaintiff told the defendant he would take the horse at the price, \$400. The horse was taken by Miller back to the farm, when, in about two weeks thereafter, plaintiff came again to Bay City, went out to the farm, met defendant there, and, in looking the horse over, found his heels were sore. Upon calling defendant's and Miller's attention to this, they both said it was nothing but the scratches, and it would be all right in a little while; that they had been blistering his heels. Plaintiff said, "What shall I do?" Miller, in presence of defendant, said, "Do nothing; they will come out all right." Instead of the feet being sore in the cracks, where scratches would come, they were sore all over the foot, and covered with white matter on top of the hoof, on the back side of the heels, and on the ankle joint. Plaintiff says: "I took the horse then, and paid the \$400, because I relied a good deal on McGraw's sayings and judgment as to what the disease was." The horse was taken to Detroit on March 15, 1887, and, as plaintiff claims, had the best of care, and was treated for scratches, and was driven but very little. About April 1st plaintiff employed a veterinary surgeon, who treated him until August. This surgeon pronounced the disease eczema. About 10 days after the horse was taken to Detroit, plaintiff met defendant at Bay City, and informed him of the condition of the horse, and that he could do nothing with him. Defendant then went to a horseman, purchased a box of medicine, and told plaintiff it would cure him. Plaintiff upon this occasion told defendant that the veterinary surgeon called the disease "eczema." Defendant said, "Ishaw, it is nothing but the scratches." It appears that the plaintiff continued to treat the horse up to November 19, 1887, when he returned him to the defendant, who refused to receive him; when he was sent to a boarding stable, and

in a few weeks after put up and sold for his keeping, and purchased at the sale for about \$40.

Some considerable testimony was given on the trial, showing the condition of the horse, and that he was affected with chronic eczema; the claim of plaintiff being that he was so afflicted at the time of the sale, and that he kept him, and attempted the cure, in reliance upon the assurances of defendant that it was nothing more than scratches; and that by reason of this he was not only entitled to recover the purchase price and interest, but also the amount expended in care and medicine and medical treatment, as well as the cost of transportation from Bay City to Detroit and return to Bay City. This last item of costs of return to Bay City the court instructed the jury the plaintiff could not recover, so that item is out of the case. No claim was made on the trial that there was an agreement made on the sale that the plaintiff might return the horse if it should prove unsound, and receive back the purchase price, and no claim was made that there was an acceptance of the horse when return was made; but it appears that no such agreement or understanding was had, and that defendant refused to accept the horse when returned. The whole case proceeded upon the theory that the warranty was made of a sound horse, which, at the time of the purchase, was not only unsound, but was wholly worthless by reason of being afflicted with a dangerous and contagious disease called "eczema," and that therefore the money paid was without consideration, and might be recovered back together with interest. We think the proofs tend to show these facts, and that this part of the case was very fairly submitted to the jury, under the charge of the court.

Defendant's counsel contends that, however this might be, there is no allegation in the declaration under which the costs of transportation, keeping, and medicines and medical attendance can be recovered, and that the plaintiff kept the horse an unreasonable length of time before offering him back, as there was nothing in the defendant's conduct or statements justifying the plaintiff in keeping the horse as long as he did. Counsel cites *Lumber Co. v. Bates*, 31 Mich. 158, in support of this proposition. We think these items, under proper proofs, could be recovered under the declaration as framed. To the two special counts were added the common counts in *assumpsit*, and under these common counts the plaintiff filed a bill of particulars setting out these items, and claiming a recovery thereon. This is a very different case from the one cited by counsel. It is claimed here that the plaintiff notified the defendant some 10 days after the purchase as to the condition he was in; that he saw him several times afterwards, and each time defendant insisted he would come out all right, and at one time gave plaintiff medicine to use. Upon this part of the case the court stated to the jury: "Now, if he was led by

Mr. McGraw to believe he ought to keep on trying, he was perfectly justified in trying, and the expense of it would be chargeable to McGraw; or, even without any encouragement on the part of McGraw, if there were any circumstances about it as in your judgment rendered it reasonable that he should keep on trying as long as he did, that he was justified in doing it, and the expense of keeping the horse while he was doing it is chargeable to McGraw. But if it should turn out that early in the season, soon after he got the horse, he found out so much about it as ought to satisfy any man of reasonable judgment and prudence that the horse was then good for nothing, and if he was led along by any statements that McGraw was making to him from time to time, then the expense of his keeping and doctoring him expired at such time as you in your judgment shall determine to be reasonable." Under the claim made by the plaintiff, which his proofs tended to support, we think this was a proper charge, and fairly submitted to the jury the questions raised.

Twenty-two errors are assigned. Several of these assignments of error relate to the refusal of the court to charge the jury as requested by the defendant. We have examined them, and are of opinion that those which the court should have given as stating the law correctly are covered by the general charge. Several of the requests of counsel for defendant were properly refused by the court. They are based upon the proposition that, inasmuch as the plaintiff made no proof that it was agreed that plaintiff might return the horse if he proved unsound, therefore he had no legal right to return it, and he must stand by his bargain, and his only remedy would be for damages for breach of warranty; that he could not return the property and sue for the consideration. From the view we take of the case, and what we have already said, these questions need not now be discussed, as the court was not in error in refusing these requests. Several assignments of error relate to the ruling of the court in allowing certain testimony to be given by the plaintiff. We do not think it would be profitable to go over the testimony given on the trial, and point out these objections, and give our reasons why this testimony is competent, and was properly admitted by the court. It is a somewhat peculiar case in some of its features. Counsel upon either side seem to have had widely varying opinions as to just what the declaration alleged, and whether it was in affirmance or rescission of the contract of sale, what testimony was admissible under it, and the measure of plaintiff's damages under the case made by it. We think the case fairly tried, and fairly submitted to the jury by the charge as given. The judgment of the court below must be affirmed, with costs.

SHERWOOD, C. J., did not sit. The other justices concurred.

MERGUIRE v. O'DONNELL. (No. 15,072.)
 136 Pac. 1033, 103 Cal. 50.)

Supreme Court of California. June 12, 1894.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by J. H. Merguire against Thomas O'Donnell for deceit. Judgment for plaintiff. Defendant appeals. Affirmed.

F. B. Ogden, for appellant. R. A. Hornblower, for respondent.

SEARLES, C. This is an action to recover damages for deceit and fraudulent representations in the sale by defendant to plaintiff of three horses. Plaintiff had judgment for \$650, from which judgment, and from an order denying a motion for a new trial, defendant appeals.

About the 1st of June, 1890, plaintiff purchased from the defendant, at East Oakland, three horses, for \$400; paying \$100 down, and the residue to be paid the following day, upon delivery of the horses in San Francisco. Defendant called upon plaintiff the following morning, in advance of the arrival of the horses, and received the residue of the purchase price. Almost immediately upon the arrival of the horses, and within an hour, they were found to be ailing, and discharging from the nose. The disease with which they were afflicted proved to be glanders. One of them was condemned by the public authorities, and killed in a short time, and the others shared the same fate a few months later. Plaintiff, after the death of the first horse, offered to return the others, and demanded a rescission of the contract, and return of his money, which was refused by the defendant. The complaint charged defendant with falsely and fraudulently representing to plaintiff that the horses were well and sound; that the plaintiff believed these statements to be true, and, relying upon them, was induced to purchase; and that defendant well knew the statement to be false, etc. The cause was tried by a jury, and the main controversy was as to these representations and knowledge by defendant of the condition of the animals. There was testimony on the part of plaintiff tending to show that defendant knew the condition of the horses, instructed his employe to keep their noses clean when plaintiff and his brother came to examine them, which was done, and that he represented to plaintiff that "they were all sound, except one horse, who had a blind eye," and at another time, during the negotiation, when asked if there was anything the matter with them (the horses), he said,

"No, except that one had a defect in the eye." On the other hand, there was a denial of all these representations by defendant, and of all knowledge on his part of any ailment or disease in the horses. A number of other witnesses on the part of defendant testified that the horses showed no signs of glanders up to the time of sale. In the face of this conflict of evidence, we must regard the verdict of the jury as conclusive upon the facts.

The jury rendered a verdict in favor of plaintiff for \$650. This, it is claimed by appellant, was excessive. There was testimony tending to show that plaintiff expended about \$100 in surgical treatment of the horses, and that he destroyed the stable in which the diseased horses had been kept, and burned the materials, which, owing to the highly contagious character of the disease, was shown to be reasonably proper. This stable was shown to have been worth \$200. As plaintiff was entitled to recover, if at all, the purchase price of the horses, which was \$400, we cannot say the added \$250 thereto was excessive, in view of the fact that the several special causes of damage were pleaded.

The instructions asked by the defendant, and refused by the court, were objectionable, for various reasons,—the first, because, while it correctly enunciated the law as to the doctrine of caveat emptor, in the absence of fraud or of a warranty, still it was inapplicable to the case at bar, in which the gravamen of the charge was (1) fraud on the part of the defendant, whereby plaintiff was prevented from discovering the diseased condition of the horses; (2) an express warranty of soundness of the horses by the defendant; and (3) because so much of the instruction as was applicable was subsequently given. Like observations apply to the refusal of the court to give the other instructions asked. The court, upon its own motion, instructed the jury upon the issues made in the case, and, so far as we observe, there was no error therein; and, as no objection was made or exception taken to such instructions, they are not the subject of review. The necessity for the destruction of plaintiff's stable, by reason of the virus of the glandered horses, is alleged in the complaint, and, not being denied by the answer, was an admitted fact in the case. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

NORTON v. NEBRASKA LOAN & TRUST CO.

SAME v. TAYLOR et al.¹

(53 N. W. 481, 35 Neb. 466.)

Supreme Court of Nebraska. Oct. 26, 1892.

Error to district court, Butler county; Post, Judge.

Motion by W. C. Norton against Byron E. Taylor and others to vacate and set aside a sale of land on a decree of foreclosure on the ground that Norton was induced to make the purchase by misrepresentations. The motion was overruled, and Norton was ordered to pay into court the amount of his bid. To reverse this order, he brings error. Affirmed.

S. S. McAllister, for plaintiff in error.
Steele Bros., for defendants in error.

NORVAL, J. The Nebraska Loan & Trust Company brought suit in the district court of Butler county against Byron E. Taylor and Lela A. Taylor, his wife, to foreclose a mortgage upon the S. ½ of section 12, in township 15 N., of range 1 E., executed by the Taylors, which mortgage was junior and subject to a prior mortgage of \$3,000 on said real estate, owned and held by one Washington Quinlin. The court found that there was due the loan and trust company on its mortgage the sum of \$1,056.60; that said Quinlin had the first lien on said premises for \$3,000, with interest thereon at 6 per cent. from July 1, 1888; and a decree of foreclosure was rendered, which directed the sale to be made subject to the lien of Quinlin. Subsequently an order of sale was issued, and the land, after being duly appraised and advertised, was sold by the sheriff to one W. C. Norton, the plaintiff in error herein, for the sum of \$2,535. The sale was reported by the sheriff to the court, and the same was approved and confirmed. Shortly thereafter, at the same term of court, the purchaser filed a motion to vacate and set aside the sale on the ground that he was induced to purchase the property by reason of certain representations made by the sheriff and the clerk of the district court as to the character of the title the purchaser would acquire. The motion was overruled, and Norton was ordered to pay into court the amount of his bid. To reverse said order Norton prosecutes a petition in error to this court.

It appears from the affidavits filed in support of the motion to set the sale aside that Mr. Norton came to the place where the sheriff was offering the property for sale, and inquired what he was selling, to which the officer replied that it was the B. E. Taylor land, and requested Norton to make a bid thereon; that Norton thereupon asked what amount must be bid to get the land, to which the sheriff replied that under the appraisement it could not be sold for less than \$2,533.60, as

that was two thirds of the appraised value, and that by paying said sum he would acquire a good and perfect title to the land, free from all liens; that the sheriff and Norton then went to the office of the clerk of the district court to ascertain what amount was against the land, and the clerk, after examining the papers, told Norton he would have to bid \$2,533.60 to get the land but he had better make the bid \$2,535 even, and thereby get a little above two thirds of the appraised value; that the payment of said sum would clear the land of all prior liens and incumbrances; that, relying upon said statements, Norton made a bid of \$2,535, and the land was struck off to him at said sum. On the next day the sheriff, on meeting Norton, said to him that the amount of his bid was not two thirds of the appraisement; that the land had been appraised at \$4,800, and could not be sold for less than \$3,200, and that unless Norton would raise his bid to said sum, he could not have the land, whereupon Norton replied he would not bid the sum of \$3,200, and the sheriff then stated that such sale must be declared off. It also appears that the statements of the sheriff and clerk were innocently made and without any intention to mislead or deceive the purchaser. It is also shown by uncontradicted testimony that the land was well worth \$6,400.

The object and purpose of the plaintiff in error is to set aside a sheriff's sale on the ground that he did not thereby acquire the title which he at the time supposed he was purchasing. No claim is made that either the plaintiff in foreclosure or Taylor or his wife was guilty of any fraud, or that any representations were made by either of them to Norton as to the character of the title to land, or that they had any knowledge at the time of the purchase of the statements and representations made by the clerk and sheriff. The only proposition presented is whether the fact of the sheriff and clerk having represented to Norton that, if he would buy the land, he would get a clear and perfect title thereto, free from liens, although such representations were untrue, was sufficient to require the court to set aside the sale. In our view, under the facts disclosed by this record, and the law applicable thereto, plaintiff in error is not entitled to any relief. Ordinarily a purchaser at sheriff's sale takes all risks. He buys at his peril, and, if the title is bad, he must bear the loss. The rule of caveat emptor applies in all its force to all judicial sales. The court undertakes to sell the title of the defendant, such as it is; and it is the duty of the purchaser to ascertain for himself the character of the title he is about to acquire. *Miller v. Finn*, 1 Neb. 254; *Smith v. Painter*, 5 Serg. & R. (Pa.) 225; *Vattier v. Lytle's Ex'rs*, 6 Ohio, 478; *Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119; *Corwin v. Penham*, 12 Ohio St. 36; *Mason v. Wait*, 4 Seam. (Ill.) 127; *Bishop v. O'Connor*, 69 Ill. 431; *Sackett v. Twining*, 57 Am. Dec. 599;

¹ Dissenting opinion of Maxwell, C. J., omitted.

Lynch v. Baxter, 4 Tex. 431. An exception to the rule above stated, recognized by the weight of authorities, is where the purchaser has been induced to bid by fraud, or under a mistake of fact. A purchaser will be released from the sale on the ground of a mistake of fact, where the mistake is not the result of his own negligence, if application therefor is made at the proper time; but he will not be released from his purchase on his mere ignorance or mistake of law. *Haden v. Ware*, 15 Ala. 119; *Burns v. Hamilton*, 33 Ala. 210; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Uplam v. Hamill*, 11 R. I. 565. The facts do not bring the case at bar within the exception to the rule, so as to entitle Norton to have the sale set aside. Neither the clerk nor sheriff misrepresented any material fact concerning the condition of the title. They did not inform the purchaser that there were no incumbrances upon the property, nor does Norton claim that he was not aware of there being a prior mortgage of \$3,000 on the premises at the time he made his bid. The clerk and sheriff supposed that the sale would extinguish all incumbrances, and that the purchaser would acquire a perfect title to the property. In so informing Norton they misstated the law, or the legal effect of the foreclosure proceedings and sale, and for which the law affords no relief. We think plaintiff in error is concluded by his own neglect. He had no right to rely upon the statements of the clerk and sheriff, but should have had the title and the proceedings under which the sale was made examined for himself, before he made his bid. Had he done so, he would have been fully apprised of the condition of the title. The records of the county and of the court are open to inspection to every one, and these records disclose the objection now urged to the title of the lands. Had an examination been made of either the petition to foreclose the mortgage, the decree, the appraisal, certificates of liens, or notice of sale, he would have ascertained that Washington Quinlin had a first lien upon the premises for \$3,000 and interest, and that the sale was to be made subject thereto. If Norton was deceived, it was the result of his own negligence in not taking the precaution to examine the records. He is chargeable with knowledge of their contents. Equity will not relieve a purchaser of his own negligence. *Roberts v. Hughes*, 81 Ill. 130; *Vanscoyoc v. Kimler*, 77 Ill. 151; *Riggs v. Purcell*, 66 N. Y. 193; *Preston v. Breckinridge*, 86 Ky. 619, 6 S. W. 641; *White v. Seaver*, 25 Barb. (N. Y.) 235; *Eccles v. Timmons*, 95 N. C. 540; *Weber v. Herrick* (Ill.) 26 N. E. 360; *Dennerlein v. Dennerlein* (N. Y.) 19 N. E. 85.

In *Eccles v. Timmons*, supra, it is held that a purchaser at a judicial sale will not be released from his bid on the ground that the title is imperfect, when the true state of the title is set out in the pleadings under which the sale was made. *Dennerlein v. Dennerlein* (N. Y.) 19 N. E. 85, was a partition sale.

The property was described in the proceedings and in the notice of sale by metes and bounds, and as "containing 31 acres, be the same more or less." Prior to the sale, handbills were issued in the name of the referee who made the sale, in which the boundary lines of the premises were omitted, and the property described as the farm of "the late John Dennerlein, containing 31 acres." The purchaser, in bidding upon the property, relied upon the statement in the handbills as to the quantity of land. Subsequently he discovered that the premises only contained 24 $\frac{3}{4}$ acres, and applied to the court for an order releasing him from completing the purchase on the ground that he had been misled as to the number of acres, which motion was denied. He appealed to the general term where the order was affirmed (46 Hun. 561), and on appeal to the court of appeals of New York it was held that he was not entitled to relief. *Vanscoyoc v. Kimler*, supra, was an appeal from an order of the circuit court sustaining a motion made therein by the purchaser to set aside a sale of a tract of land made upon execution, on the ground that he was led to believe, by misrepresentations made by the officer conducting the sale, that the land was not incumbered, when in fact it was mortgaged in excess of its value. The supreme court held that the maxim of caveat emptor applied, and that the misrepresentation of the sheriff afforded no ground for setting aside the sale. In the case at bar the price paid was so greatly inadequate to the real value of the land as to put the purchaser on inquiry. He should have known that a half section of land, which the evidence shows was well worth \$6,400, would sell for more than \$2,535,—the amount of his bid,—if there was no prior incumbrance. The land was actually worth several hundred dollars more than the amount bid by Norton and the Quinlin lien combined, so that, instead of losing anything by the transaction, the investment is still a profitable one. He does not complain that he has lost anything by the transaction, but rather that he failed to double on the investment.

Concerning what took place between the sheriff and Norton the day following the sale, to which reference has been made, we will say that it is unexplainable how the former made the statement he did, if correctly quoted in Mr. Norton's affidavit, in regard to what the land was appraised at. It is not true that it had been appraised at \$4,800, and could not be sold for less than \$3,200. The sum bid by Norton was more than two thirds the appraised value of the land as shown by the appraisal. However, what the sheriff may have said in that regard, as well as the statement that "the sale must be declared off," is of no importance, for the reason that the status of Norton as purchaser was fixed when his bid was accepted. The officer had no power or authority to afterwards release him from his purchase.

It is contended that this case falls within, and is controlled by, that of *Paulett v. Peabody*, 3 Neb. 196, and *Frasher v. Ingham*, 4 Neb. 531. We do not think so. These cases were decided upon facts materially different from these. In the first case there was a decree of foreclosure of a junior mortgage in a suit wherein the senior mortgagee was not a party. The property was sold under a decree by the sheriff, the purchaser being induced to buy the property through the false representations of the attorneys of both the plaintiff and the senior mortgagee that the prior mortgage would be paid off out of the proceeds of the sale, and that he would take the property discharged of such lien. It was held that said false representations of the parties were sufficient grounds for vacating the sale. In the case we are considering it is not pretended that any misrepresentations or fraud can be imputed to any of the parties to the suit or to Quinlin, the senior mortgagee, whereby Norton was induced to buy the land. Of course, when a fraud is practiced upon the purchaser at a judicial sale by the party in interest, which induced the purchaser to

make his bid, the sale will be set aside therefor. But the rule has no application here. In the case reported in 4 Neb. 531, the sheriff levied an execution upon, appraised, and sold a tract of land covered with timber. The sale was duly confirmed, and a deed executed to the purchaser. Afterwards it was discovered that the record of the proceedings under the writ described another tract, near by, which was of no value whatever. It was held, on a petition of the purchaser to set aside the sale, that he was entitled to relief. Clearly the case is not analogous to the one before us, for in this case there was no error in describing the lands, as in the case cited. The doctrine announced in these decisions should not be extended to cases not clearly of their class. We are of the opinion that the district court did not err in overruling the motion of the plaintiff in error to set the sale aside, and its decision is affirmed.

POST, J., concurs.

MAXWELL, C. J., dissenting.

* * * * *

PALMER v. HAND.

(13 Johns. 434.)

Supreme Court of New York Oct. Term, 1816.

This was an action of trover, tried before Mr. Justice Spencer, at the Albany circuit, in April, 1816.

The plaintiff was the owner of a raft, consisting of plank, joist, and boards; and whilst coming down the North river, in the autumn of the year 1815, with the raft, one Potter came upon the raft, and offered to buy it; the price was agreed upon: it was also agreed, that the plaintiff should deliver it at one of the docks in Albany, and be at the expense of taking it out of the water. Potter then applied to the defendant, who kept a lumber-yard, in Albany, to purchase the lumber which the plaintiff had agreed to sell him; but Potter and the defendant not being able to settle the bargain, it was agreed that the defendant should take and sell the lumber. The plaintiff arrived with his raft, the next day, and brought it to the defendant's dock, and there inquired of one of the witnesses in the cause for Potter, and asked if Potter was not to have more hands to take out and pile the lumber, and said that he had sold it to Potter. He then left the raft, and went into the city, and at 4 o'clock in the afternoon, at which time all the raft was taken out of the water, and nearly all piled, a few culling pieces excepted, the plaintiff returned and forbade any more to be piled, saying that Potter had gone off. The defendant, on the same day, advanced to Potter, on account of the deposit of lumber, 100 dollars; and also gave him an order on Wilder & Hastings, for 150 dollars, in goods, which were, in the evening of the same day, delivered to him. There was no formal delivery of the lumber to Potter, who, it was conceded, was a cheat, and had absconded. The plaintiff proved a demand on the defendant to restore the lumber, or pay for it, and a refusal. The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

Van Vechten, for plaintiff. Mr. Henry, contra.

PLATT, J., delivered the opinion of the court. This is an action of trover, for a quantity of plank and scantling. It appears that the plaintiff was owner of a raft of lumber, and while descending the river opposite to Lansingburgh, he contracted with one Potter for the sale of the lumber, to be delivered to Potter, by the plaintiff, on one of the docks, in Albany, at a price agreed on, to be paid on delivery. Potter then went to the defendant, who keeps a lumber-yard and dock, at Albany, and agreed to deliver to him the lumber of that raft, to be sold by the defendant, on commission, for Potter.

Next morning, about sunrise, the plaintiff arrived with the raft, and fastened it to the

defendant's dock. The plaintiff then told the workmen employed there, that he had sold the lumber to Potter. One or two men began immediately to pile the plank, &c., on the defendant's dock, and the plaintiff "asked if Potter was not to have more hands to take out and pile the lumber." The plaintiff then went into the city, and did not return again till 4 o'clock P. M., at which time the lumber was almost all piled on the defendant's dock. The plaintiff then forbade the piling of any more, saying that Potter had absconded.

While the men were piling up the lumber, about 10 or 11 o'clock A. M. of that day, the defendant advanced to Potter 100 dollars, and, also, gave an order for 150 dollars' worth of goods, in favor of Potter, on account of the deposit of lumber. The plaintiff, afterwards, demanded the lumber, which the defendant refused to deliver.

There is no doubt that, upon a contract to sell goods, where no credit is stipulated for, the vendor has a lien; so that if the goods be actually delivered to the vendee, and, upon demand then made, he refuses to pay, the property is not changed, and the vendor may lawfully take the goods as his own, because the delivery was conditional.

As between the vendor and vendee, in this case, I incline to the opinion that the property in the lumber was not so vested in the vendee as that the vendor could not legally have resumed it when he came, in the afternoon, and forbade the piling of any more of it.

The contract with Potter was for the whole raft, to be delivered on the dock. The vendor, therefore, had no right to demand payment for any part until the whole was delivered; and it appears that he came to the place of delivery, at 4 o'clock in the afternoon of the day on which the raft arrived at the dock, whilst the lumber was still in the course of delivery, and signified his determination not to consider the sale as absolute. He said that Potter had absconded, and ordered the men not to pile any more of the plank, &c. As between Palmer and Potter there was no such delay or acquiescence on the part of the vendor, as would be evidence of a credit given for the money. If the vendor was there, and demanded payment, as soon as the whole lumber was piled on the dock, that was enough to preserve his lien; and such, I think, is the fair construction of the evidence.

The plaintiff, in this case, seeks to enforce his lien against a person who has bona fide received the property as a pledge for money and goods advanced to Potter, to nearly the amount of its value. Those advances were made by the defendant while the lumber was in a course of delivery on the dock, and before the plaintiff asserted his claim to it. But there is no evidence that the plaintiff had any knowledge of the negotiations between Potter and the defendant, in regard to the

lumber, until after the plaintiff had made his election to rescind his contract with Potter. This is a contest, then, between two honest men, who shall be the dupe of a swindler. The strict rule of law must, therefore, be applied; and the defendant cannot be allowed to stand in a more favorable situ-

ation than Potter would have been in if he himself had withheld the possession of the lumber, without paying the price when demanded.

We are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

BENEDICT v. SCHAEFFLE.

(12 Ohio St. 515.)

Supreme Court of Ohio. Dec. Term, 1861.

Error to the superior court of Cincinnati.

Stallo & McCook, for plaintiff in error. Keble & Force, for defendant in error.

GHOLSON, J. According to the decision in *House v. Elliott*, 6 Ohio St. 497, which applies in this case, we can not inquire as to the weight of evidence on which any finding of fact was made in the court below. The finding must be against law. Assuming every fact which the evidence may tend to prove, in support of the finding and judgment of the court below, do those facts fail to establish the right of the plaintiff in the action to recover? We need not, therefore, say whether there was sufficient evidence to show that Johnson, to whom the goods were sold, was insolvent. There was, we think, evidence tending to show the insolvency of the vendee at the time of the sale of the goods, and that such insolvency was not known to the vendor. The question then arises, whether the vendor, on afterward hearing of the insolvency, may exercise the right of stoppage in transitu, or, whether, as claimed by counsel for the plaintiff in error, the insolvency, to authorize a stoppage in transitu, must be evidenced by some positive overt act, the existence of which is not inferable from any testimony in the bill of exceptions, and that such overt act must occur after the sale, and before the delivery of the goods?

It is the rule of the mercantile law, that where goods have been consigned, and are on transit to the vendee, the consignor can not vary the consignment, except in the case of insolvency. It has been said, that "the mischief and inconvenience that would ensue on a contrary supposition, are extreme. The goods might be put on board, and might lie at the risk of the consignee for two or three months; and if the consignor could come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object which might be eventually defeated, at any moment, by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller." *The Constantia*, 6 C. Rob. Adm. 321-327. In that case, the vendor had stopped and diverted the delivery of goods, and it was said, if the vendee "had been an insolvent person, it would have amounted to a complete and effective revindication of the goods. But if the person to whom they are consigned is not insolvent; if from misinformation or excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnifica-

tion for the expenses that have been incurred. * * * It is not an unlimited power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him from the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happen before the arrival, it would be sufficient to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded." 6 C. Rob. Adm. 326. In the case of *Wilmshurst v. Bowker*, 2 Man. & G. 792, 812, it was said by Tindal, C. J.: "The ordinary right of countermanding the actual delivery of goods shipped to a consignee, is limited to the cases in which the bankruptcy or insolvency of the consignee has taken place. The law as to this point is very clearly laid down by Lord Stowell, in the case of *The Constantia*."

This statement of the doctrine of stoppage in transitu, which is supported by such high authorities, does not sustain the proposition, that a vendee, insolvent at the time of the sale of goods, and still remaining insolvent, can object to their stoppage in transitu. He could only complain when his insolvency was known to the vendor at the time of sale, and the contract was made in view of such, his condition. The object in allowing the privilege to the vendor being his protection against the insolvency of the vendee, such privilege, unless waived by the vendor, ought properly to extend to cases of insolvency, whether existing at the time of sale or occurring at any time before the actual delivery of the goods. A vendee who disputes the right of stoppage in transitu, must be prepared to aver, as in the case of *Wilmshurst v. Bowker*, 2 Man. & G. 792, which was an action by a vendee against a vendor for improperly stopping the delivery of goods, that he was neither bankrupt nor insolvent. Independently of any circumstances to the contrary, the vendee might have the benefit of a presumption of ability to comply with his contract, and the burden of showing insolvency might be cast on the vendor. It may be that this would be sufficiently shown by the proof of an overt act of insolvency, such as a stoppage of payment, though, in fact, an actual insolvency, in the sense of not having means adequate to the payment of debts, might not exist. If the vendee, before the stoppage in transitu, had, by his conduct in business, afforded the ordinary apparent evidences of insolvency, he ought not to complain of the precautionary measure taken by the vendor, though it should turn out that he was ultimately able to pay. But, though no such evidences of insolvency should precede the stoppage in transitu, still, if the fact of insolvency existed the vendee ought not to complain. This, at least, is clearly to

be inferred from the language of the authority which has been cited, and appears entirely reasonable and proper. Fair dealing will be better insured by leaving to the vendor his privilege of stoppage in transitu, in all cases of insolvency, whether evidenced by the ordinary accompanying acts, or shown actually to exist. The rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage in transitu is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee, or his assignee, on the payment or tender of the agreed price.

These views are sustained by the origin and nature of the doctrine of stoppage in transitu. It appears to have been derived from, or to be analogous to, the revendication of the civil law. This has been thus defined: "Revendication is the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim, in specie, such part of the goods as remains in the hands of the vendee entire, and without having changed its quality." In *re Westzynthius*, 2 Nev. & Man. 650, note. In Bell's Commentaries on the Laws of Scotland, cited in the same case, it is said: "The privilege to stop goods in transitu, is a qualified extension in equity of that rule of mutual contract, by which, either party may withhold performance, on the other becoming unable to perform his part." It is stated, as a rule introduced into the common law, in modern times, founded on principles of equity, and borrowed from the foreign or continental law, that in case of the vendee's bankruptcy or insolvency, the vendor might stop and take back the goods in transitu, or before they come into the hands of the vendee. Bell, *Comm.*, bk. 2, pt. 2, c. 1, art. 3, cited, 2 Nev. & Man. 651, 652, note; *Mackreth v. Symmons*, 15 Ves. 343. It is "nothing more than an extension of the right of lien, which, by the common law, the vendor has upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law." *Rowley v. Bigelow*, 12 Pick. 307, 313; *Atkins v. Colby*, 20 N. H. 154; *Grout v. Hill*, 4 Gray, 351. "A kind of equitable lien adopted by the law for the purposes of substantial justice." *Hodgson v. Loy*, 7 Term R. 445. In the case of *McEwan v. Smith*, 2 H. L. Cas. 309, 328, it was said, by Lord Campbell, that "the doctrine of stoppage in transitu is a most just and equitable one, and I would by no means strive to limit its operation."

If the true principle of the right of stoppage in transitu be found in that certainly just rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform, on his part; if the foundation of the rule be a just lien on the goods for the price, until delivered, an equitable lien adopted for the purposes of substantial jus-

tice, then, it is the ability to perform the contract—to pay the price—which is the material consideration. If there be a want of ability, it can make no difference in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the contract of sale. Substantially, to the vendor who is about to complete delivery, and abandon or lose his proprietary lien, the question is, can the vendee perform the contract on his part; has he, from insolvency, become unable to pay the price? If such be his condition, and the vendor has not precluded himself by some act of waiver, the general principles on the subject and justice require that he should be allowed to exercise the right of stoppage in transitu.

To sustain the contrary view and limit the right of stoppage in transitu, the case of *Rogers v. Thomas*, 20 Conn. 53, is relied on, in which it was decided, that to authorize the exercise of the right of stoppage in transitu, there must be some overt act of insolvency, and that it must intervene between the sale and the exercise of the right. The decision in the case of *Rogers v. Thomas*, was not made on the authority of previous cases, but, in the absence of such cases, upon the ground that the general definitions or statements of the doctrine of stoppage in transitu required such a limit to the exercise of the right; and particular reference is made to the general statement of the doctrine in Smith, *Merc. Law*, 547 (Am. Ed. 677). The very first authority cited by Mr. Smith to sustain his statement of the doctrine, is the case of *Wilmshurst v. Bowker*, and he quotes the remarks of Tindal, C. J., as to the clearness with which the law on the point had been laid down by Lord Stowell in the case of *The Constantia*. Interpreting the statement of the doctrine, by Mr. Smith, in the light of the authorities he cites, and it is manifest that he never intended any such limit to the exercise of the right of stoppage in transitu. Nor do we think the terms in which the doctrine of stoppage in transitu is stated in many of the authorities, would justify the limit supposed to exist.

It was said by Lord Kenyon, in *Ellis v. Hunt*, 3 Term R. 467, that "the doctrine of stopping goods in transitu is bottomed on the case of *Snee v. Prescott*, 1 Atk. 245, where Lord Hardwicke established a very wise rule, that the vendor might resume the possession of goods, consigned to the vendee, before delivery, in case of the bankruptcy of the vendee."

The doctrine is thus stated by Lord Hardwicke. After referring to the rule, that an action against a carrier for loss of goods should be brought in the name of the consignee, he proceeds: "But suppose such goods are actually delivered to a carrier, to be delivered to A., and while the carrier is upon the road, and before actual delivery to A., by the carrier, the consignor hears A., his consignee, is likely to become bankrupt, or is ac-

usually one, and countermands the delivery, and gets them back in his own possession again. I am of opinion that no action of trover would lie for the assignees of A., because the goods, while they were in transitu, might be so countermanded." *Snee v. Prescott*, 1 Atk. 248.

In a case before cited it is said by Lord Campbell: "What is stoppage in transitu? It is this, that where a vendor of goods has to send them to a vendee, and has, for that purpose, parted from them to a carrier, he may, upon hearing of the insolvency of the vendee, while they remain in the hands of the carrier, and, before delivery to the purchaser, stop their delivery." *McEwan v. Smith*, 2 H. L. Cas. 328.

In the case of *Donath v. Broomhead*, 7 Pa. St. 301, 303, it is said: "The right of a vendor, on the discovery of the bankruptcy or insolvency of the party to whom he has sold goods on credit, to retake them before actual or complete delivery, is the well-settled doctrine of both courts of law and equity."

In the case of *Hays v. Mouille*, 14 Pa. St. 48, the judge, in his charge to the jury (and his views were expressly adopted by the court of error,) after stating that the insolvency of the vendee was the ground-work of the plaintiff's claim, thus put the question—Was the vendee "insolvent when these goods were replevied by the plaintiffs? It is not necessary, to prove insolvency, that he should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more." In that case the evidence tended to show that the vendee was insolvent when the goods were bought, and the judge further said: "You have the testimony of Baker that Rhodes was indebted some \$60,000, and that his assets were but \$26,000, and that his creditors were watching for these goods on the line of transportation, and actually attached them before they reached Ohio, for debts which he was not able to pay."

In the case of *Stevens v. Wheeler*, 27 Barb. 658, 663, there is this statement of the rules on the subject of stoppage in transitu: "That the vendor has a right to stop goods sold by him, when he discovers the vendee to be insolvent, at any time while the goods are in transitu. That the transitu continues until the goods reach the place of destination, unless sooner terminated by the act of the vendee. That a delivery to the vendee of the goods, or a part of them, or a delivery to his agent or to a bona fide purchaser from him, terminates the right of the vendor of the goods to stop them."

Not only do the general statements of the doctrine fall short of sustaining the decision in *Rogers v. Thomas*, but, in several cases, where the question was involved, it was differently decided. Such, we think, was the

case of *Hays v. Mouille*, 14 Pa. St. 48, before noticed. There it is evident, the insolvency existed at the time of the sale of the goods, and it was proved, not by any overt act, but by a comparison of the amount of liabilities with the amount of assets.

The decision in the case of *Buckley v. Furniss*, 15 Wend. 137, appears to be directly opposed to that in *Rogers v. Thomas*. In *Buckley v. Furniss*, the point was made that the vendor, at the time of the sale, knew the circumstances of the vendee, who was then insolvent. It was said by Bronson, J.: "The sale was no doubt absolute, whether the plaintiff knew that Titus was insolvent or not; and so are most sales, where the vendor afterwards exercises the right of stoppage in transitu. The right of the vendor to resume possession of goods sold on credit, in case of the insolvency of the consignee, before they come to his hands, does not depend upon any condition, or other peculiarity in the contract of sale, but proceeds on the ground of an equitable lien. Still, it may be, and probably is true, that if the plaintiff sold the iron, with a full knowledge of the situation of the vendee, he could not afterwards exercise the right of stoppage in transitu; but the argument is not borne out by the facts." The judge then proceeds to show by a reference to the facts, that although the vendee was insolvent at the time of the sale, it was not known to the vendor, who, therefore, had the right to retake the goods. This case was cited by counsel, in *Rogers v. Thomas*, but was not noticed in the opinion of the court.

There are other cases in which the decision did not turn on the question of insolvency, the contest in this class of cases having generally been as to the termination of the transit; but where it appears either directly or by strong inference, that the insolvency existed at the time of sale. Such a case is *Biggs v. Barry*, 2 Curt. 259, Fed. Cas. No. 1,402, in which it clearly appears that the insolvency existed at the time of sale; but the case was given to the jury on the question, simply, whether the transit had ended, without any reference to the time of insolvency.

In the cases of *Stubbs v. Lund*, 7 Mass. 453, and *Hsley v. Stubbs*, 9 Mass. 65, what was regarded by the court as the sale of the goods, their shipment on order, was after the insolvency of the vendee, and yet the exercise of the right of stoppage in transitu was sustained.

The point might have been made, and if sustained would have changed the decision in the case of *Mitt v. Cowley*, 1 Holt. 338, 3 E. C. L. 138, as is shown by Waite, J., in his dissenting opinion in the case of *Rogers v. Thomas*. It may not be conclusive against the correctness of a legal proposition, that it was not presented, when from the facts involved it might have been. But when this has occurred in a number of cases, where it is to be supposed that both counsel and court are well in-

formed as to the rules of law, it is a reasonable inference that the point was not made because it was deemed untenable.

We have not been able to find, and our attention has not been called by counsel to any decision which sustains the restriction on the right of stoppage in transitu laid down in *Rogers v. Thomas*; but it has been adopted as a rule of law in several elementary works. It appears to be approved in 1 Pars. Cont. 476, 478, but that approbation is omitted in the work of the same author on Mercantile Law,

and withdrawn, and a grave doubt substituted, in his more recent work on Maritime Law, volume 1, p. 369.

We are satisfied that the restriction can not be maintained either on principle or authority.

In accordance with the views which have been expressed, the judgment of the superior court of Cincinnati will be affirmed.

Judgment affirmed.

SUTLIFF, C. J., and PECK, BRINKERHOFF, and SCOTT, JJ., concurred.

JONES v. EARL.

(37 Cal. 630.)

Supreme Court of California. July, 1869.

Appeal from the district court, sixth judicial district, Sacramento county.

The action was against a forwarder for the conversion of goods. The following is a copy of the letter which is referred to in the opinion of the court:

"San Francisco, November 18th, 1867. Messrs. D. W. Earl & Co.: Gents—On the eleventh instant we shipped to your care the following goods, viz.: Two barrels whisky. Two casks ale. Two casks porter. Four baskets champagne. Four cases Hostetter's bitters. Marked: F. M. A., Virginia City. Care 'Earl,' Cisco.

"If the goods have not been forwarded yet from Cisco, please hold on to them till you hear from us again, as the party to whom they were consigned at Virginia has been attached, and we want to save the goods. If they have been forwarded from Cisco, please instruct your agent at Virginia to deliver the goods to no one but our agent, Mr. J. A. Byers, who will be at Virginia on the lookout for the goods. Please write us immediately whether the goods have been sent; if not, Mr. Byers will call for them at Cisco. Very respectfully, Biggs & Jones."

Coffroth & Spaulding, for appellant. M. A. Wheaton, for respondent

SANDERSON, J. Stoppage in transitu is a right which the vendor of goods upon credit has to recall them, or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired bona fide rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a bona fide right to them. Upon demand by the vendor, while the right of stoppage in transitu continues, the carrier will become liable for a conversion of the goods, if he decline to redeliver them to the vendor, or delivers them to the vendee. *Markwald v. His Creditors*, 7 Cal. 213; *Blackman v. Pierce* 23 Cal. 508; *O'Neil*

v. Garrett, 6 Iowa, 480; *Reynolds v. Railroad Co.*, 43 N. H. 580. And a notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage in transitu, the notice is sufficient. *Reynolds v. Railroad Co.*, supra; *Litt v. Cowley*, 7 Taunt. 169; *Whitehead v. Anderson*, 9 Mees. & W. 518; *Bell v. Moss*, 5 Whart. 189. And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier. *Bierce v. Hotel Co.*, 31 Cal. 160.

The case made by the record shows that the goods in question were consigned to the care of the defendant at Cisco, to be forwarded by him in the usual course of business to the vendee at Virginia City. That the defendant was engaged in the forwarding business at Sacramento, and had an agent at Cisco whose business it was to receive all goods shipped to the care of defendant, and deliver them to the order of the vendee upon payment of charges and commissions. That, while the goods were at Cisco and in the custody of the defendant's agent, who had full charge of the forwarding business at that place, a letter from the plaintiff, addressed to the defendant at Cisco, containing a bill of the goods, and informing the defendant that the vendee had been attached, and that he wanted to save the goods, and directing the defendant not to deliver the goods to any one except his (the plaintiff's) agent at Virginia, who would be looking out for them, was received by the defendant's agent at Cisco. That the defendant, by his agent, acknowledged the receipt of the letter, and stated that the goods were "in store and he would hold them subject to the order of Byers" (plaintiff's agent). That afterwards the vendee of the goods came to the agent of defendant and, tendering charges and commissions, demanded the goods, and that the demand was complied with. That the vendee was insolvent at the date of the notice to defendant's agent that the plaintiff desired to stop the goods in his hands.

In view of these facts, and the law as above declared, the defendant is clearly liable for a conversion of the goods.

Judgment and order affirmed.

KINGMAN et al. v. DENISON et al.

(48 N. W. 26, 84 Mich. 608.)

Supreme Court of Michigan, Feb. 27, 1891.

Error to circuit court, Kent county; William E. Grove, Judge.

Replevin by Kingman & Co. against William C. Denison and the McCormick Harvesting Machine Company. There was a judgment in defendants' favor, and plaintiffs bring error.

Taggart & Denison, for appellants. Sweet & Perkins, for appellees.

LONG, J. On July 8, 1889, defendant Denison wrote the plaintiffs at Peoria, Ill., ordering 5,000 pounds of twine. No dealings had ever been had between the parties prior to that time. The plaintiffs received the letter next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11th the twine was shipped to W. C. Denison, Grand Rapids, Mich., plaintiffs taking shipping bill from the railroad company there, and on the same day sent it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids & Indiana Railroad Company, July 17th, and on the 18th they turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made. It appears that on July 9th the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store and at a warehouse there, and a store situate at another place outside of Grand Rapids, July 10th, 11th, and 12th he gave mortgages on the same property to several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18th, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as its agent. The McCormick Harvesting Machine Company mortgage contained a clause, after a description of the property mortgaged, as follows: "And all additions to and substitutes for any and all the above-described property." On September 7th plaintiffs, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill. This draft was not paid, and on September 14th plaintiffs wrote him for prompt remittance, which was not made. On September 19, 1889, plaintiffs brought replevin against the defendants for the twine, finding about one-half of it; the balance having been sold out of the store by

the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against the plaintiffs for \$351.91, the value of the twine taken, and costs. Plaintiffs bring error.

The plaintiffs asked the court to instruct the jury that plaintiffs were entitled to a verdict; and in the ninth request asked an instruction that "if Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgagees to assume control of it, plaintiffs could retake it as against him." And in the fourteenth request it was asked that the jury be instructed that the McCormick Company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a bona fide purchaser. Several requests were also asked for instructions to the jury relating to the insolvency of Mr. Denison at the time of the purchase, and his intent not to pay for the twine at the time of its purchase, or at the time when it was received at the store, on the 18th of July. These last-named requests we do not deem it necessary to set out here for an understanding of the points involved. The requests set out were refused by the trial court, and upon such ruling the plaintiff assigns error. The court, in its charge to the jury, stated: "Plaintiff claims the right to the possession of these goods at the time this suit was commenced—First, Because as counsel claims, the goods were ordered, were purchased, by Mr. Denison at a time when he was insolvent, and knew that he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and the plaintiff's counsel also claims the right of stoppage in transit. All I need to say in regard to the latter claim is that I think the right of stoppage in transit, under the facts of this case as shown by the evidence, has no application whatever; there is no such right existing." This part of the charge relating to the right of stoppage in transit is assigned as error. The court was in error in refusing these requests to charge and in the charge as given. It is not seriously contended here but that, under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and, if so found, the question of the right of stoppage in transit was an important question in the case. The right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to

the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts. *Gibson v. Carruthers*, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the vendor and vendee in process, and for the purpose of delivery, and this right may be exercised whether the insolvency exists at the time of the sale or occurs at any time before actual delivery of the goods, without the knowledge of the consignor. *O'Brien v. Norris*, 16 Md. 122; *Reynolds v. Railway Co.*, 43 N. H. 580; *Blum v. Marks*, 21 La. Ann. 268; *Benedict v. Seacattle*, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value without fraud, to have this effect. *Harris v. Pratt*, 17 N. Y. 249. In the present case it appears that the goods arrived in Grand Rapids July 17th, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick Company took possession, and was in possession at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick Company and Mr. Denison for the twine Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick Company claimed

that by the terms of their mortgage they were entitled to hold the twine. The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of Mr. Denison. The circumstances tend strongly to show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick Company claimed that they passed to it under the terms of its mortgage. It however, stood in no better position than Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. It does not stand in the position of a bona fide purchaser of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison. These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendors' rights would have been paramount to any right which the McCormick Company could have acquired at the mortgage sale. *Underhill v. Booming Co.*, 40 Mich. 660; *Lentz v. Railway Co.*, 53 Mich. 444, 19 N. W. 138; *White v. Mitchell*, 38 Mich. 390; *James v. Griffin*, 2 Mees. & W. 623. In the view we have taken of the case, we think the other questions raised are unimportant, and we will not pass upon them. The judgment of the court below must be reversed, with costs, and a new trial ordered. The other justices concurred.

HOLLAND et al. v. REA et al.

(12 N. W. 167, 48 Mich. 218.)

Supreme Court of Michigan. April 25, 1882.

Error to superior court of Detroit.

Edward E. Kane, for plaintiffs in error.
George W. Bates, for defendants in error.

GRAVES, C. J. Keith & Holland claimed that in January, 1877, they concluded an agreement with Rea & Hale, by which they, said Keith & Holland, were to furnish during that winter at or near Stoney Point, on the shore of Lake St. Clair, in Ontario, at the rate of three dollars per thousand feet, 500,000 feet more or less of good sound elm logs of first-class quality and 14½ feet in length and not less than 18 inches in diameter; and that Rea & Hale were to take the logs so furnished and pay therefor in Canada currency or its equivalent in United States currency, that is to say \$500 down and the remainder on delivery of the logs. They further claimed that pursuant to this agreement they furnished 473,000 feet and that the supply of that quantity constituted full performance on their part and entitled them to require Rea & Hale to take said quantity as a fulfillment of the agreement and to pay therefor according to the rate and manner stipulated. That 300,000 feet were actually taken and paid for, but the remaining 173,000 feet were refused. They brought this action on the contract to recover damages of Rea & Hale for their failure to take and pay for said residue and were allowed to recover, and the defendants below being dissatisfied have brought error.

Among the points specially noticeable two relate to the terms of this agreement. The first is that the description of quantity, viz., "500,000 feet more or less," was miserably indefinite and rendered the entire agreement non-obligatory, and the second is, that supposing the agreement was binding, still the deviation from the positive quantity named was greater than the qualifying expression authorized and hence the defendants in error were by their own admission in default and the plaintiffs in error were not bound to take any more than suited their pleasure. Neither of these positions requires many words. As to the first, it was a distinct part of the understanding of the parties that the agreement in regard to quantity should not fix the precise number of feet which the defendants in error should be bound to furnish. The intent was that they should be allowed to deviate somewhat from 500,000 feet and that the plaintiffs in error should be bound to take whatever quantity should be furnished within the limits to which the deviation might properly extend, and it was certainly competent for the parties to bargain in that way. The agreement was not *prima facie* void. *Brawley v. U. S.*, 96 U. S. 168; *Cabot v. Winsor*, 1 Allen, 546; *Moore v. Campbell*, 10 Exch. 323, 26 Eng. Law & Eq. 522; *Bourne v. Seymour*,

16 C. B. 337, 32 Eng. Law & Eq. 455; *Cockrell v. Aucompte*, 2 C. B. (N. S.) 440, 40 Eng. Law & Eq. 279; *Morris v. Levison*, 1 C. P. Div. 155, 16 Moak, Eng. R. 496; *McConnel v. Murphy*, L. R. 5 P. C. 203, 8 Moak, Eng. R. 164; *Benj. Sales*, §§ 691, 692.

The question of construction is distinct and the second point presents it. It is not difficult. Where parties enter into executory arrangements for the sale of chattels to be obtained subsequently by the seller and designedly leave the exact quantity unfixed and see fit to remit its ascertainment to the future act of the seller under and subject to a stipulation that it is to be so much "more or less" their practical construction of it ought to have great weight.

Several facts of importance are undisputed.

Keith & Holland informed Rea & Hale that they had furnished 473,000 feet and that the agreement was thereby fulfilled. What did Rea & Hale do? Did they object that the quantity was not sufficient to satisfy the agreement? Did they refuse to have any of the logs and repudiate the arrangement? Nothing of the kind. They sent Baxter and Fairchild to scale the logs and the former scaled 358,000 feet and the latter a further quantity. But this is not all. They broke in upon the mass and actually took away some 300,000 feet and not only paid therefor, but for several thousand feet more.

It would be difficult to reconcile this conduct with the notion that the 473,000 feet were not mutually considered as meeting the call for 500,000 feet more or less.

But if it be regarded as a question to be settled on authority the result is the same. The deviation was quite within the degree the courts have held to be reasonable. *Cabot v. Winsor*, and *Morris v. Levison*, and *McConnel v. Murphy*, *supra*. It appeared that in March, 1877, one Aubin, who had got out a parcel of the logs and was employed also by Keith & Holland as their agent in some other matters, sold 21,000 feet to Pike & Richardson. And among the requests refused were two which proceeded on the assumption that the case contained evidence showing or tending to show that these logs never belonged to Keith & Holland and were not under their power to tender on the agreement. The assumption was not authorized.

The evidence was clear and not open to controversy that these and all the other logs were got out by third persons with the express understanding that they were to meet the contract with Rea & Hale, and be handed over to them in execution of that agreement as soon as ready, and the showing was equally explicit that when Rea & Hale were informed in February that the whole quantity was ready and they were requested to take the logs away and make payment this lot was included and at their disposal, and besides this showing the further fact was testified to and not denied that the sales made by Aubin to Pike & Richardson in March

and after said notification to Rea & Hale, was with the express assent of the latter. The agreement sued on was oral and on its completion the parties separated. Rea afterwards drew up a writing which he claimed to be an exact embodiment of the unwritten agreement and desired Keith & Holland to sign it. They did not assent to its accuracy and refused to sign it.

On the trial Rea produced a paper which he claimed to be the same and offered to make it evidence of the true agreement. The court on objection excluded it. This was correct. It was no more than Rea's personal declaration. He had prepared the paper and retained it, and no assent by Keith & Holland had been given to it. Moreover if it was the same that he had tendered for their acceptance they had expressly dissented. It was not within any rule permitting writings prepared and kept exclusively by the party offering them and unassented to by the other to be put in evidence. *Flood v. Mitchell*, 68 N. Y. 507. In connection with the offer of this writing or as part of the same general subject certain notes by the stenographers of Holland's testimony in a former trial were read and immediately stricken out on motion. This was right. They had no place in the actual contention. It is not certain they would have been admissible in any view. But apart from the writing referred to they were wholly irrelevant.

It is also a matter of complaint that the court neglected to direct the jury as requested to allow nothing for difference between the money of the United States and of Canada. It is not pretended that there was any difference in point of fact and effect if the charge was to leave the case as though none existed. The exception has no force. There was evidence that after Rea & Hale made default the remaining logs were sold by Keith & Holland to another, and among the numerous requests to charge the following was preferred: "That the plaintiffs had no right to sell the logs in question without notice to the defendants, and if the jury believe they did so that was a rescission of the contract in this suit and the plaintiffs cannot recover."

It is now generally assumed that where the agreement is silent in regard to it and no special incidents appear to contend for it and where the extent of the vendee's liability is not to be unalterably decided by the price obtained, no notice of the resale itself is necessary. On the other hand it is held by high authority that to entitle the vendor to proceed by resale instead of rescission or by action for the whole agreed price or actual consideration, he must manifest his election by preliminary notice that he intends to sell and hold the vendee for the loss or notice to that effect. This notice it will be observed is not a notice of resale, but a notice that the vendor will assert the right of resale and bind the vendee by the price obtained.

The application of this doctrine, requiring notice of an election to resell, is now urged by Rea & Hale, who insist that the trial judge in neglecting the above request disregarded it and committed error. No complaint as we understand is made of the treatment of the request as one dealing with the subject of notice of resale itself, and it is plain that no ground exists for any. Are these parties entitled to question the action of the trial judge on the other ground? We think not. Under the practice pursued the subject is not open. The request was equivocal. It fell short of indicating with any distinctness that the notice alluded to was notice of election to resell rather than notice of actual resale itself, and the inference is pretty strong that the judge understood the request as referring to a notice of resale only, and shaped his directions to the jury on that understanding and no exception was taken to the charge actually given on this part of the case.

As the request was fairly open to such construction and the conception of it by the judge was apparent, or it was obvious at least that the request had not drawn his mind to the application of it now insisted on, and no offer whatever was made to explain it, it would be hardly reasonable to permit it to be read here in another sense for the purpose of breeding error, if such would be the result. But this is not all. The very fact that the request was ambiguous and liable to mislead is a sound reason for deeming its rejection not sufficient for a charge of error. The request should have clearly shown which notice was meant.

Error is alleged on the exclusion of the offer of certain evidence. The complaint is that Rea & Hale were cut off by it from recouping damages. The point is not maintainable. Had the facts embraced in the offer been established the event would have been the establishment of an agreement wholly distinct and different from that set up by Keith & Holland, and which they were bound to substantiate or fail in the action, and no damages arising from the breach of another and wholly different agreement could be recouped. *Thompson v. Richards*, 14 Mich. 172.

The claim seems to be made that the refusal of certain requests in some way prejudiced Rea & Hale's right of set-off. The suggestion is not very clear. But it is enough to say without going further that the case did not authorize the remedy by set-off. The action was for the breach of a special agreement and brought to recover unliquidated damages and was therefore founded on a demand incapable of being the subject of set-off. Section 5796, Comp. Laws; *Smith v. Warner*, 14 Mich. 152.

All the questions worthy of notice have now been considered. The charge to the jury was fair and there is nothing in the record to call for any interference with the result.

The judgment is affirmed with costs.

The other justices concurred.

WONDERLY v. HOLMES LUMBER CO.

(23 N. W. 79, 56 Mich. 412.)

Supreme Court of Michigan. April 22, 1885.

Error to superior court of Detroit.

H. M. Campbell, for appellant. Wilkinson & Post and Taggart & Wolcott, for appellee.

SHERWOOD, J. In August, 1882, the plaintiff, a lumberman residing at Grand Rapids, entered into negotiations with the defendant, a lumber company in Detroit, for the purchase of lumber manufactured and to be manufactured near Stanton, Michigan, which resulted in the execution of a contract by which the defendant purchased from the plaintiff all the white pine lumber which the Wagar Lumber Company had cut for the plaintiff after January 1 of the same year, also all the lumber which should thereafter be cut for him by said company up to January 1, 1883. The defendant did not take all the lumber cut during said period, and about January 1, 1883, the defendant refused to take any more under the contract, or to make any further payments; and the plaintiff, after giving notice of his purpose hereinafter mentioned, sold the lumber which was not taken by the defendant, and brings this suit for the defendant's alleged breach of the contract, and seeks to recover the difference between the amount which it brought on the sale and the price agreed upon in the contract.

The defendant claims (1) that the contract it made for the purchase of the lumber was based upon certain representations as to the grades and quality of the lumber, upon which the defendant had the right to and did rely, and which were untrue; (2) that in making the sale of the lumber not taken by defendant, plaintiff did not realize all that could have been made out of it, and which it was his duty to do before recovery could be had. The cause was tried in the superior court of Detroit before a jury, and the plaintiff recovered \$3,428.70. Defendant brings error.

The notice attached to the defendant's plea sets up in effect the defense that the plaintiff warranted the grades and qualities of the lumber. The written contract between the parties was preceded by several letters relating to the lumber and price thereof which the defendant desired to purchase, a brief summary of which is as follows:

"August 11, 1882, defendant writes to the plaintiff that he has seen the lumber and requests prices by grades. August 16th, the plaintiff writes that he prefers to sell mill-run. August 17th, the defendant writes that he would just as soon buy mill-run as by grades; makes some inquiry as to top logs, grade of logs, and how they were butted in the woods, and concludes: 'We want

to know just what we will get if logs are same as those being cut now. Send us an estimate of lumber cut and piled to August 15th, by grades.' August 18th, the plaintiff writes that the logs are all same as are being cut now, gives approximate amount cut and piled, promises to get estimate of each grade, and states terms of payment generally. August 19th, the defendant writes arrangements for meeting to conclude contract. August 22d, the plaintiff sends an 'estimate of the different grades as piled,' in which he gives quantities by grades, in each instance prefixed by the word 'about,' and takes the further precaution to add that it is 'estimate only,' and offers to sell the stock at \$13 per M., as per his settlement for sawing, and have same loaded on cars; says lumber should be good, as all coarse logs are taken out for shingles. August 23d, the defendant acknowledges receipt of said 'estimate,' notices that it covers only 1,500,000 out of 1,700,000 feet sawed, states percentages, and offers \$12 per M.; proposes terms of payment; states, 'If this is a fair estimate, \$12 per M., cash, is all the stock is worth.' August 24th, the plaintiff corrects omission in estimate, declines offer of \$12, and again offers to sell at \$13 for that then on hand, and what shall be cut up to January 1, 1883. August 25th, the defendant notifies the plaintiff of decision to take lumber now cut and what may be cut up to January 1, 1883, at \$13 per M., providing manner of payment as stated August 23d suits, and suggests arrangements to meet and fix up contract and other details."

On the thirtieth of August, in pursuance of the arrangement for that purpose, the parties met at Grand Rapids, where a contract in writing was entered into for the purchase and sale of the lumber then cut and sawed and afterwards to be cut and sawed previous to the first of January, 1883, (a copy of which will be found in the margin.)¹

¹ This agreement, made this thirtieth day of August, A. D. 1882, by and between Joseph H. Wonderly, of Grand Rapids, Michigan, party of the first part, and the Holmes Lumber Company, a manufacturing corporation organized under the laws of the state of Michigan, and having its principal office at Detroit, party of the second part, witnesseth:

(1) That the said party of the first part, in consideration of the sum of five thousand dollars (\$5,000) to him paid by the said party of the second part, and of the further payments to be made by said party of the second part, as hereinafter provided, hereby agrees to sell unto said party of the second part all of the white pine lumber which has been sawed for him by the Wagar Lumber Company since January 1, A. D. 1882, and all that said last-named company shall saw for him during the remainder of the current year, at and for the contract purchase price of thirteen dollars per thousand feet, board measure, mill-run; said lumber shall include all grades of lumber above mill-ends.

(2) The final settlement and payment for said lumber shall be made according to the scale made pursuant to the terms of the contract

It appeared on the trial that the amount of lumber which was covered by said contract was 2,456,157 feet. Of this the defendant, prior to January 1, 1883, received 1,010,563 feet. Having paid in the mean time, besides the \$5,000 down, \$9,225.71, by the terms of the contract a large sum was payable January 1, 1883, which the defendant refused to pay, and also refused to proceed under the contract. Thereupon plaintiff gave this notice:

"To the Holmes Lumber Company, Detroit, Mich.:

"You having defaulted in the payment due me from you, under contract dated August 30, 1882, for the sale and purchase of my lumber cut by the Wagar Lumber Company during season of 1882, and having refused to further perform said contract, I hereby give you notice that unless you forthwith pay at least one-half of the (\$12,971 9-100) twelve thousand nine hundred and seventy-one 9-100 dollars that fell due on said contract on the first inst., and come to an immediate settlement, and speedy adjustment and payment of the remainder thereof, I shall proceed to sell the portion of the said lumber still on hand for the best prices I can obtain for it, and credit you with the

proceeds thereof, to apply on the amount due and to become due on said contract. If you will make payment and settlement as above stated, all past breaches of said contract, and all claim for damages arising from such breaches, will be waived.

"Dated Grand Rapids, January 23, 1883."

Plaintiff then proceeded under the notice to sell the lumber which defendant had refused to receive, and sold it nearly all at private sale, realizing therefor \$14,621.03, and the value of that which remained unsold was \$549.43. There was a small bill of lumber which defendant had purchased of plaintiff, December 16, 1882, amounting to \$100.49, outside of the contract, which was admitted by consent. Including this, plaintiff's loss, as he claimed, from defendant's breach of the contract, aside from all expense of selling the lumber, was, with interest, \$3,428.70,—the amount of the judgment he recovered. The defendant claims the lumber was not examined by its agents with a view of ascertaining its quality; that what was cut was in piles, so that its quality could not be determined from inspection; that the contract was made on the basis of estimates furnished by plaintiff, and that the defendant expressly relied upon them; that the representations as to

dated December 14, 1880, between said Wonderly and the Wagar Lumber Company, and said scale shall be conclusive upon both parties to this contract in determining the amount of said lumber.

(3) The shingle logs shall be assorted out of the logs hereafter to be manufactured into lumber under the terms of this contract, in like manner as they have been assorted out of the logs from which the said lumber, now cut and in pile, was manufactured.

(4) The said party of the second part hereby agrees to buy all of the said lumber manufactured and to be hereafter manufactured as aforesaid, and to pay therefor at the price of thirteen dollars per thousand feet, board measure, in manner following, viz.: The sum of five thousand dollars (\$5,000) shall be paid at the execution and delivery of this contract. All lumber shipped by said party of the second part from the first to the fifteenth days of each month, shall be paid for at the aforesaid contract price, upon the twentieth day of the same month; and all lumber shipped by said second party from the sixteenth (16th) to the end of each month, shall be paid for on the fifth day of the next succeeding month, at said contract price. Not more than 230,000 feet, board measure, of said lumber shall be shipped in any one period of 15 days above mentioned, unless, before such further shipment shall be made, said second party shall pay said first party in advance sufficient money to pay for the amount of lumber so to be shipped in excess of 230 M. feet during such 15-day period; the price of such excess of shipment to be \$13 per thousand feet, the same as all of said lumber.

(5) It is further agreed that all lumber now sawed and in the yard, or an equal amount of the lumber covered by this contract, shall be shipped out during the year 1882; or, if not shipped within that time, that said amount of lumber, being about 1,800,000 feet, shall be paid for in full on or before January 1, 1883.

(6) It is further agreed that so much of the lumber covered by this contract as shall be manufactured between this date and October 1, 1882, shall be shipped out by said party of the second part before May 1, 1883; or, if not so

shipped, then the same shall be paid for in full on or before the day last mentioned; and it is further agreed that all of said lumber manufactured after October 1, 1882, shall be fully paid for on or before June 1, A. D. 1883.

(7) It is further agreed that the title and ownership of said lumber shall not pass from said Wonderly to said party of the second part, except as the same is shipped out of the mill-yard pursuant to this contract or fully paid for.

(8) It is further agreed that the five thousand dollars (\$5,000) advance payment heretofore mentioned shall be held by said party of the first part until the final settlement of all matters embraced in this contract; and upon such final settlement said sum (\$5,000) shall be applied towards the payment of the last four hundred thousand (400,000) feet of said lumber, and any balance still unpaid shall then be paid by said party of the second part to said party of the first part.

(9) It is further agreed that said party of the first part will keep said lumber insured to the amount of \$5,000 or upwards, for the benefit and protection of said party of the second part, and at his own expense, until the title of the same shall pass to said second party as hereinafter provided.

(10) It is further agreed that said party of the second part may from time to time give said party of the first part directions in writing concerning the manufacture of said lumber, and that said party of the first part will cause such directions to be observed and followed as far as possible in the sawing of said lumber.

(11) It is further agreed that said party of the second part shall have all of the rights in relation to the loading of said lumber upon the cars that are secured unto said party of the first part by the said contract, dated December 14, 1880, between him and the Wagar Lumber Company.

In witness whereof, the said party of the first part has hereunto set his hand, and the said party of the second part has hereunto signed its name, by its secretary, this thirtieth day of August, A. D. 1882.

Joseph H. Wonderly,
Holmes Lumber Co.
By Hugh A. Holmes, Sec'y.

quality are all in writing, and were relied upon by defendant; that the representations were of such character as implied knowledge on the part of the plaintiff both as to quality of grades and quantity of the lumber; and that the defendant had a right to rely upon the same, and if the lumber failed to comply with the representations made, then the plaintiff was guilty of false warranty. Defendant also claims that these positions are fully sustained by the preliminary negotiations had by letters which resulted in making the contract sued upon, and that, as explanatory of the contract, they should have been received in evidence.

The plaintiff, on the other hand, claims that the defendant's plea and notice limits the inquiry to the terms of the contract itself; that the preliminary letters form no part of the agreement entered into, and themselves show it was not intended they should; that when they are looked upon in the light of the circumstances under which they were written, they show that all the propositions that were made, as to quality, grades, and quantity, were well and carefully guarded; that the plaintiff had declined to treat with the defendant for a sale by grades; that he only gave an opinion as to that which defendant's agent could not see, and which, at most, could only be construed a qualified estimate, and not intended to be definite; and that both parties contemplated the final agreement, when made, should be put in writing, and which was finally done, and this alone must be looked to for the extent and limit of the plaintiff's obligations; that these opinions and indefinite estimates, given under the circumstances they were, cannot be made the basis of a claim of false warranty; that such a construction would be doing violence to the intention of the parties, to the injury of the plaintiff; that the doctrine of caveat emptor applies with full force to such a case; and that all prior treaties and conversations to the making of the contract, and which resulted therein, should be excluded, as merged therein, and the warranty, if any, and whatever its character, must be found in that instrument.

This conflict of views between the parties raises one of the vital questions in the case. By a careful inspection of the contract between the parties it will be discovered there is nothing ambiguous in its meaning or in any of the terms used. It is not a bill of sale simply, but a full and well-completed contract. It also relates to every subject alluded to or treated of in the correspondence between the parties which resulted in the making of the contract. Both of the parties were engaged in the lumber business and trade when the contract was made, and there is nothing in the case showing that either had the opportunity to acquire, or did if he could profit by his superior knowledge of the business in hand or its surroundings. Under such circumstances, to admit the correspondence and treaties had between the parties before they

culminated in the contract by which they had agreed to be governed, would not only be a plain violation of the most elementary principles of law and rules of evidence, but also every reason upon which the rules established in such cases are founded.

The two objects to be accomplished in reducing a contract to writing, are (1) to limit the terms of the agreement to what are therein expressed; and (2) to perpetuate the evidence of the existence of the contract,—both of which would be completely frustrated in this case if the preliminary negotiations of the parties, offered by defendant's counsel, had been received in evidence. The ruling of the judge of the superior court upon this subject was correct.

In construing the contract the court held, in substance, and charged the jury, that, whatever the product of the sawing of the Wagar Lumber Company was above mill-culls, the defendant was bound to take it, and that it made no difference whether it was of the highest or lowest quality. This charge was excepted to by defendant's counsel. I can see no ground for this exception. I think the construction given is the plainest deduction that can be made from the language used in the contract.

It is said by counsel for defendant that there is nothing said in the contract about the amount of each grade, unless it is implied in the term "mill-run," used in the instrument, and this it is claimed does not cover the subject of grades of lumber so as to exclude a specific warranty thereof, but rather implies the manner of payment. The fact is that the term not only indicates and specifies that the defendant was to take all the grades, save the one excepted out, as they came from the mill, but also that what the lumber came to at the price agreed upon per thousand was to be determined in the same way. Had it been that any warranty as to the quality and amount of the different grades was intended, it certainly would have been put into the contract when the subject was thus so clearly before the parties at the time the contract was made. In that event, of course, the amount, if it had been agreed upon, in each grade would have been stated, and the quality would also have been defined, if a warranty had been intended in a very different manner. To hold otherwise between the parties to this record, with their business capacity, and experience and familiarity with the lumber trade, would be to assume they were unable to make contracts for themselves required in their trade, and that it is the duty of the courts to exercise a superintending care over their agreements when brought before them, and make them for the parties, when either considered himself aggrieved in his transactions with the other, instead of enforcing them as made. Such is not the rule of law nor of common sense.

Really the record, I think, shows the plaintiff refused to sell by grade, and if so, it pre-

cludes all ideas of a warranty by grades as to quality. So far as the logs were to be cut after the making of the contract, there does not appear to be any testimony showing that they did not comply with the contract relating thereto, or with the representations contained in the letters of August 18th and 22d. Witnesses Backus and Swartz were inquired of as to the value of the lumber which was not taken by defendants, and the averages. They seem to have been competent, and I have discovered no error in admitting their testimony.

The ruling of the court as to the manner of sale, and diligence necessary to be exercised by the plaintiff in making sale of the lumber which defendant refused to take under the contract, is in different forms made the subject of several objections; none of which, however, I think are well taken. There were several modes of disposing of the lumber left upon the plaintiff's hands by the refusal of the defendant to take it under the contract. Any of these modes would have been entirely proper, and in such case, if the party adopts such as his judgment approves as the best, and uses proper diligence in the mode adopted, no more can be required of him. One thing is quite clear: the plaintiff would not be obliged to incur any expense requiring an advance of money in making sales not absolutely necessary in either of the modes that might

be adopted. The question, whether the plaintiff did his duty in making sale of the lumber not taken, was properly submitted to the jury, their verdict is in favor of the plaintiff, and this is final upon the question.

I think the charge of the court was clear upon the points made in the case before the jury, and sufficiently covered all the questions contained in defendant's request to charge, necessary to aid them in coming to a correct conclusion; and no error was committed in refusing to charge the other requests. I do not think the record presents a case in which the rule laid down in *Picard v. McCormick*, 11 Mich. 68, is applicable. Neither do I think any error was committed in allowing the jury to take the memorandum to their room when they retired. The rule is undoubtedly as claimed by counsel for the defendants. In *re Foster's Will*, 34 Mich. 21; *Manufacturing Co. v. McAlister*, 36 Mich. 327. But this case falls within the exceptions, and no prejudice could have resulted to either side by the course pursued.

After a full and careful investigation of the points made upon the record in this case, I have been unable to discover any error, and the judgment of the superior court of Detroit therein should be affirmed.

CHAMPLIN, J., concurs in result. COOLEY, C. J., and CAMPBELL, J., concur.

UNEXCELLED FIRE-WORKS CO. v. POLITES.

(18 Atl. Rep. 1058, 130 Pa. St. 536.)

Supreme Court of Pennsylvania. Jan. 6, 1890.

Error to court of common pleas, Lawrence county.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, McCOLLUM, and MITCHELL, JJ.

W. H. Falls, for plaintiff in error. *D. Jameson*, (with him *G. E. Treadwell*), for defendant in error.

CLARK, J. This is an action of assumpsit, brought July 20, 1888, to recover the price of a certain lot of fire-works and celebration goods, ordered by the defendant, George Polites, from the Unexcelled Fire-Works Company, of New York, in February, 1888. The first order, which was for his store in New Castle, was given through the plaintiff's agent, Alexander Morrison, and amounted to \$208.53; the second, sent directly to the plaintiff, was for the defendant's store in Washington, Pa., and amounted to \$123.83. These orders were in writing, and were signed by the defendant. They specified, not only the particular kind and quality of the articles ordered, but contained also a schedule of the prices to be paid therefor. The goods were to be shipped in May, and were to be paid for on the 10th day of July thereafter. Upon receipt of these orders the plaintiff transmitted by letter a formal acceptance of them. A contract was thus created, the obligation of which attached to both parties, and which neither of them, without the agreement or assent of the other, could rescind. On the 5th day of April, 1888, the defendant, by letter, informed the plaintiff that he did not want the goods, and notified the plaintiff not to ship them, as he could do better with another company. The plaintiff's reply was that they had accepted the orders, and had placed them in good faith, and that the goods would be shipped in due time, according to the agreement. The goods were shipped within the time agreed upon,—the first lot to New Castle, and the second lot to Washington, according to contract; but on the arrival the defendant declined to receive them. The carrier notified the shipper that, owing to the dangerous and explosive quality of the goods, they would not retain them in their possession. The plaintiff thereupon received them back from the carriers, and placed them on storage, subject to the defendant's order.

The plaintiff alleges that it is a manufacturer and importer of such fire-works as are used in the 4th of July celebrations throughout the country; that it is not profitable to

carry these goods over from one season to another, and that therefore the quantity manufactured and imported depends upon the extent of the orders received; that the defendant's orders entered into its estimates of goods to be made up and imported for the season of 1888, and that the goods ordered by the defendant were actually made up before the order was countermanded. The defendant testifies, however, that Mr. Morrison, the plaintiff's agent, informed him, at the time he gave the first order, that the plaintiff had some, at least, of the articles in stock, and that he did not order any, either to be manufactured or imported on his account; that the transaction was simply a bargain and sale of goods, and not an order for goods to be manufactured or imported; and the evidence does not seem to conflict with this view of the case. It is plain that the notice given to the plaintiff by the defendant not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiff thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiff itself made the carrier its agent for delivery, but the goods were in fact not delivered. A delivery was tendered by the carrier, when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered. We think the statement was sufficient to justify a recovery of such damages, as the words of the statement were clearly to this effect; but there was no evidence given of the market value of the goods as compared with the price. It does not appear that the plaintiff had suffered any damage. For anything that was shown, the goods were worth the price agreed upon in the open market. While the manifest tendency of the cases in the American courts now is to the doctrine that when the vendor stands in the position of a complete performance on his part he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery. Judgment affirmed.

WINDMULLER et al. v. POPE et al.¹

(14 N. E. 436, 107 N. Y. 674.)

Court of Appeals of New York. Dec. 6, 1887.

Appeal from general term, supreme court, first department.

Action brought by Louis Windmuller and Alfred Roelker against Thomas J. Pope and James E. Pope to recover damages from defendants for the breach of a written contract for the sale and delivery on the part of plaintiffs of about 1,200 tons of old iron Vignol rails, to be shipped from Europe. The cause was tried before Larremore, J., and a jury, and upon verdict for plaintiffs judgment rendered for \$19,439, the amount of principal and costs. On appeal, the general term affirmed the judgment against defendants, and they bring the case to the court of appeals.

Carlisle Norwood, Jr., and W. W. Niles, for appellants. Bernard Roelker and Cephas Brainard, for respondents.

PER CURIAM. We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the twelfth of June, 1880, notified the plaintiffs that they would not receive the iron rails, or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendants at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it, and by a sale of the iron to other parties change their position. *Dillon v. Andersen*, 43 N. Y. 231; *Howard v. Daly*, 61 N. Y. 362; *Ferris v. Spooner*, 102 N. Y. 12, 5 N. E. 773; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Cort v. Railway Co.*, 17 Adol. & E. (N. S.) 127; *Crabtree v. Messersmith*, 19 Iowa, 179; *Benj. Sales*, §§ 567, 568.

The ordinary rule of damages in an action

by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery. *Dana v. Fiedler*, 12 N. Y. 40; *Dustan v. McAndrew*, 44 N. Y. 72; *Cohen v. Platt*, 69 N. Y. 348. The just application of this rule to the circumstances in this case requires that, in computing the damages, the defendants should be credited with the difference between the freight from Cronstadt to New York fixed by the charter-party, less the sum which it cost the plaintiffs to be released from the charter, and also with any other expenses which the plaintiffs would naturally have incurred in performing their contract to deliver the iron in New York. The contract price being known, and the market price of the iron in New York at the time of the breach and subsequently having been proved, as also the sum which the plaintiffs paid for damages and expenses on account of the charter and the customary rate of insurance, the computation of the damages was a simple arithmetical problem. All these elements were before the jury, and the verdict does not exceed, indeed it is less, than the sum which, on the view of the evidence most favorable to the defendants, the plaintiffs were entitled to recover. The plaintiffs on the trial proved the market value of the iron at St. Petersburg, where it was at the time of the breach, and also that they sold it on the twelfth of July at a certain price. The plaintiffs also gave evidence of various expenditures made by them, which it is unnecessary to recapitulate. It is claimed that some of these items could not properly be considered in estimating the damages. Assuming that this may be true, the fact remains nevertheless that the verdict is fully warranted by the competent and uncontradicted evidence. The amount of the verdict is justified, whether the market value of the iron in St. Petersburg or New York is taken as a basis. The evidence also shows without contradiction that, on the resale, the iron brought its full market value, irrespective of storage, and it is not important to determine whether the plaintiffs could fix the market price by a sale without notice to the defendants.

There is no merit in the defense, and the exceptions are in the main technical and frivolous, and none of them we think, require a reversal of the judgment. The judgment is therefore affirmed. All concur, except RAPALLO, J., absent.

¹An extract from this opinion is reported in 107 N. Y. 674; but the opinion is here given in full, as reported in 14 N. E. 436.

MOODY v. BROWN.

(34 Me. 107.)

Supreme Judicial Court of Maine. 1852.

On exceptions from the district court; Hathaway, J.

Assumpsit, on account for materials and labor furnished, and one on an account for articles sold and delivered. The account was for stereotype plates, \$18; alteration of same, \$4; and some interest and expressage, making in all \$25.04.

A witness for the plaintiff testified that in behalf of the plaintiff he presented the bill and requested payment, to which the defendant replied that he had ordered the plates, but did not feel able to take them; that there was a mistake in them which the plaintiff was to correct at his own expense; that he afterwards carried the plates to the store of the defendant, who refused to take them; that he left them there, against the remonstrance of the defendant; that the defendant afterwards offered to pay \$20 for the whole bill; that at a still subsequent period, the witness asked the defendant when he would pay the \$20, who replied that he would do it in a few days; and that the defendant afterwards repeatedly said he would pay the twenty dollars.

The judge instructed the jury, that, if defendant contracted for the plates to be made for him, and refused to accept them when made, although he might be liable to plaintiff in an action for damages for not fulfilling his contract, yet he would not be liable in this action for their value, as for goods sold and delivered; that if they were left at defendant's store against his consent and remonstrance, such a proceeding on the part of plaintiff could have no effect to vary the liabilities of defendant.

But if afterwards defendant offered to pay the twenty dollars in full for the bill, and if that offer was accepted, the plaintiff would be entitled to recover the twenty dollars and interest thereon from the time such offer was accepted, but that defendant would not be bound by that offer, unless it was accepted.

Before SHEPLEY, C. J., and WELLS, RICE, and APPLETON, JJ.

J. E. Godfrey, for plaintiff. Mr. Simpson, for defendant.

SHEPLEY, C. J. There is not a perfect agreement of the decided cases upon the question presented by the exceptions.

The law appears to be entirely settled in England in accordance with the instructions, *Atkinson v. Bell*, 8 Barn. & C. 277; *Elliott v.*

Pybus, 10 Bing. 512; *Clarke v. Spence*, 4 Adol. & E. 448.

The case of *Bement v. Smith*, 15 Wend. 493, decides the law to be otherwise in the state of New York. The case of *Towers v. Osborne*, *Strange*, 506, was referred to as an authority for it. The plaintiff in that case does appear to have recovered for the value of a chariot, which the defendant had refused to take. No question appears to have been made respecting his right to do so, if he was entitled to maintain an action. The only question decided was, whether the case was within the statute of frauds.

In the case of *Bement v. Smith*, C. J. Savage appears to have considered the plaintiff entitled upon principle to recover for the value of an article manufactured according to order and tendered to a customer refusing to receive it.

This can only be correct upon the ground that by a tender the property passes from the manufacturer to the customer against his will. This is not the ordinary effect of a tender. If the property does not pass, and the manufacturer may commence an action and recover for its value, while his action is pending it may be seized and sold by one of his creditors, and his legal rights be thereby varied, or he may receive benefit of its value twice, while the customer loses the value. The correct principle appears to have been stated by Tindal, C. J., in the case of *Elliott v. Pybus*, that the manufacturer's right to recover for the value depends upon the question, whether the property has passed from him to the customer. The value should not be recovered of the customer, unless he has become the owner of the property, and can protect it against any assignee or creditor of the manufacturer.

To effect a change in the property there must be an assent of both parties. It is admitted that the mere order given for the manufacture of the article does not affect the title. It will continue to be the property of the manufacturer until completed and tendered. There is no assent of the other party to a change of the title exhibited by a tender and refusal. There must be proof of an acceptance or of acts or words respecting it, from which an acceptance may be inferred, to pass the property.

This appears to be the result of the best-considered cases.

There is a particular class of cases to which this rule does not apply, where the customer employs a superintendent and pays for the property manufactured by installments as the work is performed.

Exceptions overruled.

GODDARD v. BINNEY.

(115 Mass. 450.)

Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 4, 1874.

Contract to recover the price of a buggy built by plaintiff for defendant. Plaintiff agreed to build a buggy for defendant, and to deliver it at a certain time. Defendant gave special directions as to style and finish. The buggy was built according to directions. Before it was finished, defendant called to see it, and in answer to plaintiff, who asked him if he would sell it, said no; that he would keep it. When the buggy was finished, plaintiff sent a bill for it, which defendant retained, promising to see plaintiff in regard to it. The buggy was afterwards burned in plaintiff's possession. The case was reported to the supreme judicial court.

C. A. Welch, for plaintiff. G. Putnam, Jr., for defendant.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. *Crookshank v. Burrell*, 18 Johns. 58; *Sewall v. Fitch*, 8 Cow. 215; *Robertson v. Vaughn*, 5 Sandf. 1; *Downs v. Ross*, 23 Wend. 270; *Eichelberger v. McAnuley*, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*, 1 Best & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See *Maberley v. Shepard*, 10 Bing. 99; *Howe v. Palmer*, 3 Barn. & Ad. 321; *Baldry v. Parker*, 2 Barn. & C. 37; *Atkinson v. Bell*, 8 Barn. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in *Mixer v. Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand,

if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. *Spencer v. Cone*, 1 Mete. (Mass.) 283. "The distinction," says Chief Justice Shaw, in *Lamb v. Crafts*, 12 Mete. (Mass.) 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Gardner v. Joy*, 9 Mete. (Mass.) 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman v. Meigs*, 4 Cush. 497, and *Clark v. Nichols*, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. St. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than *Mixer v. Howarth*. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. *Dixon v. Yates*, 5 Barn. & Adol. 313, 349. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided

that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. *Noy, Max.* 89, 2 *Kent, Comm.* (12th Ed.) 492. *Bloxam v. Sanders*, 4 *Barn. & C.* 941. *Tarling v. Baxter*, 6 *Barn. & C.* 360. *Hinde v. Whitehouse*, 7 *East*, 571. *Maconber v. Parker*, 13 *Pick.* 175, 183. *Morse v. Sherman*, 106 *Mass.* 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not

undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

COLT and ENDICOTT, JJ., absent.

HEWSON-HERZOG SUPPLY CO. v. MINNESOTA BRICK CO.

(57 N. W. 129, 55 Minn. 530.)

Supreme Court of Minnesota. Dec. 21, 1893.

Appeal from district court, Hennepin county; Otis, Judge.

Action by the Hewson-Herzog Supply Company against the Minnesota Brick Company for breach of contract. There was a verdict for plaintiff, and from an order granting a new trial it appeals. Affirmed.

Fletcher, Rockwood & Dawson, for appellant. Young & Lightner, for respondent.

BRICK, J. This action was brought to recover damages on account of defendant's failure to manufacture and deliver brick to the plaintiff according to the conditions of a written contract made between the parties, and dated April 1, 1890. Upon the trial the court below directed the jury to find a verdict in favor of the plaintiff for the sum of \$26,445. Subsequently, on defendant's motion, the court granted a new trial, upon the ground that the evidence as to damages was insufficient, and from this order the plaintiff appeals.

The contract provides that the defendant shall manufacture and sell to the plaintiff, during the season of 1890, all the pressed brick to be made by the defendant at its yards at Wheeler, Dunn county, Wis., and to burn, and have ready for shipment during the season commencing on or before June 9, 1890, good merchantable pressed brick, equal in all respects to the best stock brick of the St. Louis Hydraulic Press Brick Company, of St. Louis, Mo., in weight, finish, and trueness, and of color equal to the samples, to the number of not less than 3,000,000, and as many more as defendant could make, up to the number of 6,000,000, and to ship in accordance with instructions of the supply company, and furnish daily reports of bricks made, and shipped, and on hand. The plaintiff was to sell and dispose of said brick in any market it deemed best, and to pay defendant \$13.50 per thousand for such brick on board cars at defendant's yards at Wheeler, Wis., upon the basis of \$2.50 per thousand for freight to St. Paul or Minneapolis, and, if the freight was greater than this amount, the difference should be deducted from the \$13.50 per thousand for the brick. The payments were to be made monthly in cash on all brick sold and delivered during the current month, and plaintiff was to sell for immediate delivery the brick so manufactured as soon as they were made and ready for shipment, and to sell on or before January 1, 1891, not less than 3,000,000 pressed brick, and as many more as possible, up to the total amount of the output of defendant. The defendant made various attempts to manufacture the brick mentioned in the contract, but did not suc-

ceed, and it was unable to furnish the plaintiff with the amount of brick required by the terms of the contract, only a few thousand being furnished. By reason of this failure, the plaintiff alleged that it was damaged in the sum of \$27,000. In its memorandum attached to the order granting a new trial, the court below states as the ground for so doing that the evidence as to damages was insufficient to support the verdict. This view of the case is fully warranted by the record, and we cannot see how the court could properly have done otherwise.

There were several erroneous rulings of the court below in the admission and exclusion of evidence, which finally led up to the order directing the jury to find a verdict for plaintiff, whereby his rights were greatly prejudiced. It appears that the defendant was a manufacturer of brick, and the plaintiff a jobber, middleman, or wholesale dealer, bargaining for the entire output of the defendant's yards, with the view of reselling the brick at a profit. To more fully understand the situation of the case, we state that it appears from the evidence that the officers or agents of the respective parties, at the time of the making of the contract, had their offices in the same room in a building in the city of St. Paul, and so continued until some time in the month of November, 1891, and that plaintiff had the exclusive agency or contract with the St. Louis Hydraulic Press Brick Company for some time prior to the date of the contract between these parties, and during the entire period covered by the contract, and for a long time thereafter, under which it was enabled to purchase, and did purchase, brick of the character in suit at the price of \$16 per thousand at St. Louis, the freight thereon from St. Louis to St. Paul and Minneapolis up to September 1, 1890, being \$5.51, making the cost price in those places \$21.51, and from that date to January 1, 1891, \$6.03, making the cost price at same places \$22.03. The St. Louis Brick Company was a large manufacturer of this kind of brick, and was always able, ready, and willing to fill, and did fill, all such orders for this kind of brick for the plaintiff as it desired, and which brick plaintiff was at liberty to sell at St. Paul, Minneapolis, and in the cities of Stillwater, St. Cloud, and smaller places in the surrounding country, except that it was not permitted to sell the St. Louis brick at Duluth or Superior. On the trial the plaintiff was permitted to show by two witnesses, against the objections of defendant, that the market value of the pressed brick of the character described in the contract was \$28 per thousand at Minneapolis, but on cross-examination they testified that this price or market value was that which the jobber or agent charged to the builder, and not the price or value of such brick when sold by the manufacturer to a jobber or agent, and that as to such prices or values they had

no knowledge. Upon this subject no other testimony was given by plaintiff, although its principal managing officers were examined as witnesses upon the trial. A witness for the defendant testified that there was a difference in the market price or value of brick sold by the manufacturer to the jobber or agent, and the price or market value of brick sold by the jobber or agent to the builder or contractor, which evidence was not disputed. The court below held the measure of damages to be the difference between the contract price of the brick delivered in St. Paul or Minneapolis, viz. \$16 per thousand, and the price which the jobber or middleman charged or sold the brick to the builder or contractor viz. \$28 per thousand, but limited the amount of the recovery to \$9 per thousand, because the plaintiff only demanded that amount in its pleadings. In cases of this kind, no more damages can be recovered than such as were within the contemplation of the parties when the contract was entered into, and which would likely result from a breach thereof; for the familiar rule may be applied here "that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to both parties." It cannot be reasonably or legally claimed that these parties ever contemplated that, if the defendant was unable to perform the conditions of its contract, the measure of damages should be the difference between the price of the brick to the plaintiff at St. Paul or Minneapolis, viz. \$16 per thousand, and the price which the plaintiff, as jobber, charged or sold the brick for to the builder or contractor. Such a rule or measure of damages would compel the defendant to pay the plaintiff all the expense of carrying on its business, including the value of time spent, costs of handling, and other incidental expenses attending the sale of 3,000,000 brick at retail, for a period of nine months at least, the time covered by the contract. The result would also be that the plaintiff would receive a greater sum as damages by reason of the defendant's default than it could obtain as profits if the defendant had performed all the conditions of its contract with plaintiff. This is not the compensation as damages which the law permits by reason of the breach of a contract. The rule stated as law in *Sutherland on Damages* (volume 1, p. 17) is this: "This universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs." Plaintiff was not entitled to recover, as damages, any greater sum than the difference between the contract price of the brick at St. Paul and Minneapolis, viz. \$16 per thousand, in the quantities and at the periods mentioned in the contract, and the market

value at those places which it would have to pay as jobbers or middlemen for brick of a similar kind, and in the quantities which it was entitled to receive under its contract. (*Tower Co. v. Phillips*, 23 Wall. 471;) and this rule of damages must be qualified as to this case by another one, to be stated hereafter.

The plaintiff was not entitled to recover the damages, in one lump sum, which resulted from the defendant's breach of contract, for all of these brick were not to be delivered at one time, nor in one gross or total quantity, but in different quantities and at different periods. The rule seems to be pretty well settled that where, under a contract of sale, goods are to be delivered at certain specified periods and in specified quantities, and as such period arrives, if no delivery or only a partial delivery takes place, the damages are to be estimated as of those periods when such contract ought to have been performed. *Wood's Mayne, Dam. § 206*. And the rule is there further stated that "if the defendant absolutely repudiates his contract at any period previous to the final date specified, and the plaintiff elects to treat the contract at an end, yet in considering the question of damages they will still be estimated with reference to the times at which the contract ought to have been performed." If this were not the rule, there might be great injury and injustice done to a party where the periods of performance extended through a great many years, and the market prices or values might vary during the different periods of performance of the contract.

We are also of the opinion that the court below erred in striking out the evidence in regard to the conditions existing between the plaintiff and the St. Louis Brick Company. That there was a breach of the contract between these parties on the part of the defendant was well established, and the question to be determined is as to the extent of the defendant's liability upon such default. There was neither fraud, nor intent on its part to produce such default, but, on the contrary, it seemed to make great effort to fulfill its duty and obligations to the plaintiff in this respect. In such case it was the duty of the plaintiff to render the injury or damages as light as possible. It could not, by its negligence or by its want of reasonable exertion, unnecessarily enhance the amount of damages to which the defendant would be liable by reason of its breach of the contract. When a party is injured by nonperformance of a contract, especially of the kind existing between these parties, the other party, if he has it in his power, is bound to lessen the damages if he can do so by reasonable exertions, and, if he is necessarily compelled to perform more labor or put to greater expense, these are matters which are properly chargeable against the party in default; and, if a party who is entitled to the benefits of a con-

tract receives notice from the other party that he cannot perform its conditions, then it is the duty of such party to save the party in default, as far as it is in his power to do so, all further damages, though the performance of this duty may call for affirmative action, (1 Suth. Dam. pp. 149-151;) and, where all the facts and surrounding circumstances are sufficient to fully satisfy the party not in default that the other party cannot and will not perform the conditions of the contract between them, he should also use reasonable exertions to save the party in default from further damages. It appears in this case that the plaintiff, at all times during the existence of this contract, had it in its power to procure brick of the St. Louis Brick Company, of the kind and quantity called for by this contract, at St. Paul or Minneapolis, with freight charges added, making the additional expense about \$6 per thousand. The quantities and kind of brick required or needed could always be obtained by the plaintiff without delay or trouble. It had an extensive territory in which to sell its St. Louis brick, and it does not appear that any of its customers ever complained of the price, or that they were not supplied in the quantity, and of the kind, and at the times needed by them. The only difference to the plaintiff was the cost price of the brick at St. Paul and Minneapolis. The measure of damages, then, which plaintiff was entitled to recover, if upon the whole case it proved its cause of action, was the difference between the cost price of the defendant's brick, as shown by the contract, and the St. Louis brick delivered in St. Paul and Minneapolis, and which plaintiff had to pay for as jobber. This rule is, of course, applied to this case upon the evidence found in the record, and should not be rendered inapplicable by reason of the fact that the plaintiff was author-

ized to sell the defendant's brick in the cities of Duluth and Superior, some 150 miles distant from St. Paul and Minneapolis, but was prohibited from selling the St. Louis brick in those places. But the above measure of damages should be modified or qualified as to the amount of brick needed or required to supply the demands of its customers at Duluth and Superior, and upon another trial it should be permitted to show, if it can do so, the amount of damage it sustained by reason of the defendant's default in not furnishing it with the quantity of brick needed to supply such customers at those places during the existence of the contract. The plaintiff had no right, however, to demand of the defendant that the brick so to be manufactured should be delivered to it at Duluth or Superior, but only on the cars at Wheeler, Wis. It appears that St. Paul and Minneapolis were the market places, nearest to Wheeler, for such kind of brick. It may be difficult to establish a just measure of damages as between these parties in this case, in view of the complicated conditions existing as to the Duluth and Superior territory; but we think that the measure of damages, as applied to that territory, should be the difference between the contract price of the brick at Wheeler, Wis., viz. \$13.50 per thousand, with the cost of freight to those places or territory added, and the price which plaintiff could as a jobber or middle man procure brick for, at the lowest market value, or for a less price if reasonably possible, of a similar kind, and in sufficient quantities, and at the times mentioned in the contract, to the amount or quantity which it could sell or needed at those places. We construe the contract in question as one of sale, and not one of agency. The order granting a new trial is affirmed.

RUSSELL, et al. v. HORN, BRANNEN & FORSYTH MANUF'G CO.
(59 N. W. 901, 41 Neb. 567.)

Supreme Court of Nebraska. June 26, 1894.

Error to district court, Douglas county; A. N. Ferguson, Judge.

Action by the Horn, Brannen & Forsyth Manufacturing Company against T. M. Russell and O. H. Pratt, partners doing business as Russell, Pratt & Co. Judgment for plaintiff, and defendants bring error. Reversed.

Kennedy & Learned, for plaintiffs in error. Breckenridge, Breckenridge & Crofoot, for defendant in error.

IRVINE, C. The Horn, Brannen & Forsyth Manufacturing Company, hereinafter called the "Horn Company," brought an action in the district court of Douglas county to recover from F. M. Russell and Orlo H. Pratt, copartners doing business as Russell, Pratt & Co., and hereinafter referred to as "Russell & Pratt," \$1,285.22, with interest, alleged to be due the Horn Company as a balance for goods sold and delivered to Russell & Pratt. The account attached to the petition showed charges against Russell & Pratt amounting to \$4,562.93, and credits amounting to \$3,277.71. Russell & Pratt answered, admitting payments to the Horn Company of large sums of money for gas fixtures and merchandise sold and delivered to Russell & Pratt, but denying indebtedness to any amount, and further denying every allegation of the petition not expressly admitted. The answer then set up three counterclaims; the first being for \$1,086.65, as commission and profits to which Russell & Pratt were entitled on the sale of certain gas and electrical fixtures to one Hendrix, it being charged that the list price of said fixtures was \$1,898.19, and that, under the contract existing between the parties, Russell & Pratt were entitled, as their profit on said transaction, to 50, 10, and 5 per cent. of said list price. The second counterclaim charged that on March 1, 1889, an agreement was entered into between the Horn Company and Russell & Pratt whereby the Horn Company agreed to give Russell & Pratt the exclusive agency for its wares for the state of Nebraska and certain other territory, and agreed not to sell any of its fixtures to or through any other person within the territory mentioned save to Russell & Pratt; that the agreement was to remain in force for one year; that the Horn Company, in violation of its agreement, sold to and through other persons in the city of Omaha, and elsewhere in the territory mentioned, fixtures and merchandise covered by the agreement, whereby Russell & Pratt were deprived of large profits, and were unable to dispose of a large quantity of merchandise purchased from the Horn Company in reliance upon such agreement; wherefore damages were prayed in the sum of \$1,200. The third counterclaim

alleged that on May 13, 1890, they ordered from the Horn Company merchandise at the agreed price of \$648.50, which order was accepted by the Horn Company, and which the Horn Company agreed to fill, but subsequently refused to fill, to Russell & Pratt's damage in the sum of \$373.74. The reply was a general denial. There was a trial to a jury, and a verdict and judgment for the Horn Company for \$922.17, from which Russell & Pratt prosecute error.

Certain rulings of the court on the admission and rejection of evidence are discussed in the briefs, but cannot be considered, for the reason that the assignments of error do not point out the rulings complained of. Upon the subject of the first counterclaim,—the sale of goods to Hendrix,—the evidence tended to show that Hendrix was erecting a number of houses, and that Russell & Pratt had made, or caused to be made, two bids for furnishing gas fixtures therefor. These bids contemplated the use of fixtures other than those of the Horn Company's manufacture. Mr. Ryan, a traveling salesman of the Horn Company, appeared in Omaha. At the request of Russell & Pratt, he went with Mr. Russell to Balfe & Read, who were gas fitters in Omaha, was introduced to a member of that firm by Russell, and made for Balfe & Read an estimate for the fixtures for the Hendrix houses. The bid formulated by Balfe & Read upon that estimate was accepted by Hendrix, and the goods sold directly, without the further intervention of Russell & Pratt. Russell & Pratt claim that it was the agreement between them and the Horn Company that the Horn Company's salesman should assist them when desired in making sales; that Ryan acted ostensibly for that purpose; that it was the understanding with Ryan that, while he should make the estimate, the sale was to be to Balfe & Read on behalf of Russell & Pratt, not a direct sale by the Horn Company; that Russell & Pratt would be entitled under their agreement to purchase the goods at a discount of \$1,086.65 from the list price; and that, in violation of their contract with the Horn Company, they were deprived of this sum, by reason of Ryan's making the sale directly. There was evidence tending to establish this contention. The Horn Company claims that it was the voluntary proposition of Russell & Pratt that Ryan should make the estimate and the sale, and that Russell & Pratt had in this instance waived their right of insisting that the Horn Company should sell no goods except through them. This contention is also not without some support in the evidence. Upon this subject, the court, at the Horn Company's request, instructed the jury as follows: "You are instructed that even if you believe from the evidence that Russell, Pratt & Co. had, at or about the time the contract for furnishing gas fixtures for the Hendrix houses was entered into,

an exclusive agency for the sale of the plaintiff's goods in the city of Omaha; that if you further believe from the testimony that they (defendants) introduced the plaintiff's salesman Ryan to Messrs. Balfe & Read, and stated to Balfe & Read that any agreement Ryan made would be satisfactory to them, and that there was no understanding on the part of Balfe & Read at that time that they were to procure the goods ordered through Ryan from Russell, Pratt & Co.,—such action, and statements constitute a waiver on the part of Russell, Pratt & Co. of their exclusive agency, if any existed, and they are not entitled to recover from the plaintiff any damages under the first counterclaim set up in the answer." We think in giving this instruction the learned judge erred. It will be observed that it stated that if Russell & Pratt introduced Ryan to Balfe & Read, and stated to them that any arrangement Ryan made would be satisfactory to Russell & Pratt, and that Balfe & Read did not then understand that they were to procure the goods from Russell & Pratt, then that these facts constituted a waiver by Russell & Pratt of their exclusive right. This would be a correct statement if this were a proceeding against Balfe & Read. If Balfe & Read did not understand that their purchase was to be from Russell & Pratt, and if Russell & Pratt informed them that any arrangement they made with Ryan would be satisfactory, and Balfe & Read had acted upon that statement, Russell & Pratt would be estopped as against them from claiming anything to the contrary; but this case does not affect Balfe & Read at all, and such an estoppel would not operate in favor of the Horn Company. If the understanding was, as Russell & Pratt claimed, that Ryan should make the estimate to Balfe & Read on behalf of Russell & Pratt, then it was immaterial what Balfe & Read understood, and there would in such case be no waiver. The statement claimed to have been made by Russell to Balfe & Read, that Russell & Pratt would be satisfied with any arrangement that Ryan made, is susceptible of two constructions, according as the other evidence in the case may be viewed. It might mean that Russell & Pratt were willing to allow Ryan to sell directly for the Horn Company, or it might mean merely that Russell & Pratt authorized Ryan to make any arrangements he saw fit for them, and that Russell & Pratt would supply the goods according to any contract as to prices or terms which Ryan might make. It was for the jury, in this case, to determine the nature of the transaction, and decide this question. This instruction left it to be determined by Balfe & Read's judgment, or more accurately by the jury's determination of what Balfe & Read's understanding of what Ryan's authority might be.

It must not be understood from the foregoing discussion that the court is committing itself to Russell & Pratt's contention that their

measure of damages on account of this transaction would be the discount from the list price to which Russell & Pratt were entitled. There is some evidence tending to show that Russell & Pratt were under obligations to sell at the list prices, but their measure of damages would be the amount of profit which they would have made had the sale been through them. It was clearly not contemplated that this sale should be at list prices; otherwise there was no occasion for calling into activity the discretionary authority of Ryan to make an estimate. There can be no doubt that Ryan was authorized to fix the price at which the goods were to be sold to Balfe & Read, and, if the facts in relation to this counterclaim should be determined in favor of Russell & Pratt, the measure of damages would be the difference between the price at which, under their contract, Russell & Pratt were entitled to buy the goods from the Horn Company, and the price at which Ryan agreed to sell them to Balfe & Read. We think the court correctly refused an instruction asked by Russell & Pratt stating a different rule.

Complaint is made of the eighth instruction given by the court at the request of the Horn Company. It is as follows: "You are instructed that, before the defendants are entitled to recover any damages under their second counterclaim, they must first prove that the plaintiff has sold its goods within the defendants' territory between the dates of March 1, 1889, and March 1, 1890; and the amount which the defendants would be entitled to recover would be the profit which the plaintiff made by selling to outside dealers over what it would have realized had it sold to Russell, Pratt & Co., unless you further find that the defendants have suffered actual pecuniary loss by reason of the plaintiff so selling its goods; and, if you find the defendants have suffered such loss, then the measure of damages is such an amount as the defendants have proven by a clear preponderance of the evidence they lost in profits on the sale of plaintiff's goods, which they can show with reasonable certainty they would have made had the plaintiff not sold any of its goods within the defendants' territory." We do not think that Russell & Pratt were prejudiced by this instruction. We agree with them that where one person has, by contract, the exclusive right to buy from another and resell, within a certain territory, goods in which such other person enjoys a monopoly, and such other person, in violation of his contract, sells such goods to other persons within the territory, the measure of damages is the profit which such first person may with reasonable certainty show that he would have realized if the contract had been performed by the other party. *Mueller v. Spring Co.* (Mich.) 50 N. W. 319; *Hale v. Hess*, 39 Neb. 42, 46 N. W. 261. The difficulty in such case is always to establish with legal certainty the amount of such profits

but, if proper proof be made, the law permits such recovery. *Mining Co. v. Humble*, 14 Sup. Ct. 876. The instruction quoted states this rule to the jury, and the fact that it also states that Russell & Pratt might recover whatever the Horn Company realized by selling the goods to others over and above what it would have realized by selling to Russell & Pratt does not prejudice them. It was an extension, and not a restriction, of the rule of damages.

Upon the subject of Russell & Pratt's measure of damages upon the third counterclaim, the following instruction was given, at the Horn Company's request: "You are instructed that, under their third counterclaim, the defendants are only entitled to recover as damages the difference between the agreed price of the goods purchased of the plaintiff and their market value at the time the plaintiff refused to deliver them, and the defendants must prove that market value, which would be the amount Russell, Pratt & Company and other like dealers would have to pay the plaintiff for such goods at the time of the refusal to ship them." The measure of damages upon this counterclaim would be the difference between the price at which the Horn Company had agreed to sell the goods to Russell &

Pratt and the market value of such goods at the time and place when and where they should have been delivered. There was evidence tending to establish both of these facts. The failure in this instruction to state the place where the market price was to be fixed was probably cured by another instruction, but the definition given of "market value" in this instruction was erroneous. There was evidence tending to show that such fixtures as those ordered were purchasable in Omaha, at the time of the alleged breach of contract, at a discount of 20 per cent. from the list price. This instruction practically excluded such evidence from consideration. The market value at Omaha was the price at which the goods were obtainable there, without regard to the person from whom they were to be obtained. It was not the amount that Russell & Pratt or any one else would have to pay to the plaintiff, and the jury should not have been restricted to a consideration of the plaintiff's prices.

There were many other assignments of error, but, upon consideration, we find that in respect to them the action of the trial court was substantially correct, and the conclusions reached upon the instructions referred to render a further discussion of the record unnecessary. Reversed and remanded.

BROWNELL et al. v. CHAPMAN.

(51 N. W. 219, 84 Iowa, 504.)

Supreme Court of Iowa. Feb. 2, 1892.

Appeal from superior court of Council Bluffs; J. E. F. McGee, Judge.

Action on a contract, in substance as follows: "April 12th, 1889. D. Chapman, Esq., Council Bluffs, Iowa—Dear Sir: We will furnish you one of our Scotch marine boilers, 54 dia., 84 long, made of 60,000 T. S. marine steel shells, 5-16; * * * all the above delivered and set up, (you to do all wood-work,)—for the sum of ten hundred and twenty-three dollars, (\$1,023.00.) We will allow you three hundred and sixty dollars (\$360.00) for your two engines, boiler, heater, and inspirator, wheels, shafting, and couplings. Hoping to receive your order, we are, yours truly, Brownell & Co. P. S. We guaranty to deliver above in thirty days from April 13th. It is understood you are to have 90 days' option on sale of engine and boiler you have." "Accepted, D. Chapman." This action is to recover the balance of the contract price, after deducting the \$360 for the defendant's engines, etc. There was a failure to deliver the boilers, etc., on the part of the plaintiffs for some 18 days after the time specified in the contract; and the defendant presents a counter-claim because of the failure and for defective workmanship in putting in the boilers. A reply put in issue certain allegations of the counter-claim, and a trial by jury, resulting in a verdict and judgment for the defendant for \$31.25. The plaintiffs' appeal.

Isaac Adams, for appellants. D. B. Daily, Emmet Finley, and Ambrose Burke, for appellee.

GRANGER, J. Lake Manana is a small lake in the vicinity of Council Bluffs, in Pottawattamie county, and is a summer and pleasure resort. Boats are used on the lake for the accommodation of visitors, and among them was one known as the "M. E. Rohrer," belonging to the defendant. The boat was operated on the lake in the season of 1888, and the boilers and machinery constructed for, as known to the parties, were to refit the boat for use in the season of 1889. A breach of the contract on the part of plaintiff by a failure to deliver within the time is not questioned, and the important question on this appeal is as to the proper measure of damage. The superior court admitted evidence to show, and instructed the jury on the theory, that the measure of damage was the rental value of the boat during the time the defendant was deprived of its use in consequence of the breach. The appellants' thought is that the measure of damage is the "interest of the capital invested in the boat." This latter rule has something of support in authority, but it is far outweighed by the number of cases and the rea-

soning supporting the rule adopted by the court. In considering the question we must keep in view the rule, universally recognized, that the damage for breach of contract must be limited to such as would naturally come within the contemplation of the parties at the time the contract was made. The plaintiff, when it agreed to furnish and set the boilers, knew they were to be used in operating the boat; that a breach on its part would deprive the plaintiff of its use; and it would naturally contemplate the value of such use as the injury that would be sustained; and such is, as a matter of fact, the actual damage. The appellants cite a number of cases, but all except two, we think, support the rule adopted by the court. *Brown v. Foster*, 51 Pa. St. 165, is a case quite similar to this. Repairs to a boat by putting in machinery were to be completed by October 1st. The work was not done until December 15th. The trial court gave, as the rule of damage, "that the measure in such a case is the ordinary hire of such a boat for the time in question, for the time plaintiff was in default." The complaint in that case of the rule as given was by the defendant, who was seeking damage, and the court said his complaint was without reason. The case cited is not authority for the appellants' position. In *Mining Syndicate v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665, the interest on the investment in a mill that had been delayed because of defective machinery was allowed as the measure of damage, but only in case the jury found there was no evidence of the rental value of the mill. The case clearly recognizes the rule as to rental value as a correct one. In *Griffin v. Colver*, 16 N. Y. 489, is the following syllabus, having full support in the opinion: "Upon a breach of a contract to deliver at a certain day a steam-engine built and purchased for the purpose of driving a planing-mill and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam-engine may be regarded as damages." In *Nye v. Alcohol Works*, 51 Iowa, 129, 50 N. W. 988, this general principle has support argumentatively, but another rule, because of distinguishing facts, is sustained. The cases of *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640, and *Taylor v. Maguire*, 12 Mo. 313, are not in harmony with this view, but they are clearly overborne by the weight of the other cases and the current of authority. The latter case cites, as decisive of the point, *Blanchard v. Ely*, 21 Wend. 342. In *Griffin v. Colver*, supra, the *Blanchard Case* is commented upon and explained, and, in effect, it is divested of the authority claimed for it in the Missouri case.

But it is said that the boat in question had no established rental value. By this it is meant that the boat had never been rented. But it will not do to say that because an ar-

ticle has never been rented it has no rental value, any more than it would to say that because an article had never been sold it has no market value. We should assume that an article suitable and adapted for use at a time and place has both a market and rental value, at least until the contrary appears. In *Jemison v. Gray*, 29 Iowa, 537, this court approved an instruction that "the fact, if proven, that 12,213 ties could not have been purchased for immediate delivery in the market at the places where said ties were to be delivered on the 1st day of October, 1869, would not, of itself, establish the fact that there was not a market price for such ties at such time and place." The holding affords a strong presumption in favor of a market price. A like presumption would prevail in favor of an article having a value for hire at a time and place where such articles are in demand for use. The testimony shows that boats varying in size were rented on the lake during the season, both by the day and for trips. This boat had perhaps twice the carrying capacity of any other boat on the lake, and in that respect formed an exception; but the rental value of boats depended on their size and adaptation for use, and it was competent for persons having knowledge of the business and prices paid for other boats to give an opinion as to the rental value of such a boat as the one in question. It is contended that the method of ascertaining the rental value involves the uncertainties and facts on which profits are excluded as a rule of damage; but we think not. It is true that rental values are generally fixed from a calculation of the profits to be derived from the use, but the rental is a fixed, definite value, agreed to be paid, and the bailee assumes the uncertainties as to the profits.

The appellants say: "For an analogous case to the one at bar, in there being an attempt to prove a rental value to property when the facts showed that the property in question had no rental value, the court is referred to *Coal Co. v. Foster*, 59 Pa. St. 365." The case, as we read it, is without a bearing on the question. The defendant agreed to furnish for the coal company an engine of a particular size and make. There was no other engine of the kind that the company could use. There was a delay in the delivery, and the company was compelled to transport its coal by horse-power, as it had before done. The trial court gave the rule "that the measure of damage for the delay was the ordinary hire of a locomotive during the period of delay." The reviewing court gave the rule as the difference between the cost of transporting the coal by horse and by locomotive power, but placed its ruling on the fact that the parties knew there was no other engine to be operated on the track of the company, and could not have had such

damage in view in making the contract. It will be seen that the cases are different. If in the case at bar the defendant's boat had been operated at an additional cost by doing the same amount of work during the delay, it would be reasonable to say the damage to him was the difference in the cost. But his is an entire loss of use, and the value of such use is the damage, where it is proximate, and not speculative or uncertain.

2. A part of the counter-claim is for loss of time by men kept in readiness by defendant to do the part of the work belonging to him in adjusting the boilers and machinery, as provided by the contract. On this branch of the case the court gave the following instruction: "(5) If you find from the evidence, and under the third and fourth instructions, that there was a contract, as set out, between plaintiffs and defendant, and that plaintiffs were in default in carrying out said contract; and if you find that, by reason of such default, defendant was damaged; and if you further find that defendant was in readiness to carry out his part of said contract at the time specified therein; and that at the time he was in readiness to run and operate his boat; and that the boat was necessarily idle during the period of plaintiffs' default, by reason of such default, —then the defendant would be entitled to recover the ordinary and reasonable rental value of said boat during the time of said default, and such reasonable and necessary amount (if there be any such amount) as he may have been required to pay to any men that he may have employed during said enforced idleness for the purpose of running said boat, if he had any such men in his employ who remained in his employ and idle by reason of such default; and if you find that the defendant had placed himself in readiness to work upon said boat himself at the time specified in the contract for the furnishing of said machinery, and that he necessarily remained idle during the time of such default, if any, of the plaintiffs, and used ordinary diligence to find other employment for that time, you will then further find the fair and reasonable value of his services during the period of such default as part of the damage, if any, which defendant sustained." Complaint is made of the instruction, as stating an erroneous rule of damages, but we discover no error. If, because of the breach, the defendant lost his or the time of his employees, for such time and expense he should be reimbursed. The rule is recognized in *Mining Syndicate v. Fraser*, *supra*. The instruction fairly protects the rights of the plaintiffs. A number of other questions are argued, all of which we have examined, and find no prejudicial error. It would serve no good purpose to extend the opinion to present them. The judgment is affirmed.

PHILBROOK v. EATON.

(134 Mass. 398.)

Supreme Judicial Court of Massachusetts.
Suffolk. March 2, 1883.

Tort, by the administrator of the estate of John D. Philbrook, for the conversion of certain household furniture. Answer, a general denial. Trial in the superior court without a jury, before Wilkinson, J., who allowed a bill of exceptions in substance as follows:

The plaintiff, as administrator, made a demand upon the defendant for said furniture before bringing this action, but the defendant did not deliver it, having previously, in July, 1879, sold it to one Sawyer. The defendant was allowed to put in evidence, subject to the plaintiff's exception, that he borrowed of the plaintiff's intestate \$250, and gave as security therefor a mortgage of a parcel of real estate in Beverly, and, as additional security, a bill of sale of said furniture, dated January 17, 1874, in which a consideration was expressed to be \$250, the receipt of which was acknowledged; that no money was paid except the sum of \$250 so lent; that the intestate never took possession of said furniture, but it had always remained in the possession of the defendant until he sold it to Sawyer, as above stated. The bill of sale was not recorded. There was no evidence of value except the bill of sale, and the fact of the sale of the furniture to Sawyer.

The defendant asked the judge to rule as follows: "(1) If the instrument relied on was a bill of sale, it was without consideration, and no title passed to the vendee. (2) The goods named in the bill of sale were pledged, and, the goods never having been in possession of the pledgee, no title passed, and this action cannot be maintained. (3) An administrator is not a party so as to come within Gen. St. c. 151, § 2. (4) The amount recoverable in an action for conversion is the value of the goods at the time they were converted. No value having been proved, and the existence of the goods not having been proven, nothing can be recovered in this action. (5) This action cannot be maintained against the defendant, as at the time of the alleged conversion he had not possession, nor any control over or interest in the goods."

The judge declined so to rule, but ruled that, as between the original parties, the action could be maintained whether the goods were mortgaged, pledged or sold, and that, on the evidence of the consideration of the amount named in the bill of sale, and the nature of the goods, he found the damages to be \$75. The defendant alleged exceptions.

J. F. Wiggin and B. M. Fernald, for plaintiff. C. C. Barton and A. D. McLellan, for defendant.

COLBURN, J. The written instrument under which the plaintiff claims is a formal bill of sale, not a bill of parcels, and on its face

purports to be the evidence of an absolute sale of the property therein described by the defendant to the plaintiff's intestate in consideration of \$250, which the defendant acknowledges that he received.

The plaintiff, who by operation of law represents the personal property and rights of his intestate, sustains the same relation to the defendant, and to the property in controversy, that his intestate sustained before his decease. No question as to the right of creditors or purchasers without notice is raised.

As between the plaintiff and defendant, no delivery of the property was necessary to pass the title. *Parsons v. Dickinson*, 11 Pick. 352; *Packard v. Wood*, 4 Gray, 307.

The plaintiff, upon proof of the execution of the bill of sale, and payment of the consideration, which was sufficiently proved, *prima facie*, by the acknowledgment of the defendant in the bill, and proof of a sale of the same property by the defendant to Sawyer, in July, 1879, the bill of sale being dated January 17, 1874, was *prima facie* entitled to recover of the defendant the value of the property at the time of the sale to Sawyer.

To control the plaintiff's case, the defendant was allowed, under exception of the plaintiff, to introduce parol evidence, which he claimed tended to show that the transaction was not a sale, but a mortgage, or pledge, and was without consideration. We are of opinion that this evidence, so far as it was admitted for the purpose of varying, explaining or controlling the bill of sale, was incompetent in an action at law, and should have been rejected. *Pennock v. McCormick*, 120 Mass. 275; *Harper v. Ross*, 10 Allen, 332.

Whatever other effect the evidence introduced by the defendant might, if competent, have had upon the bill of sale, it failed to show any want of consideration. It tended to show that the bill of sale was given as part of the security for a loan of \$250 from the plaintiff's intestate to the defendant, which was a good consideration.

The defendant's second and third requests for rulings relate to the effect upon the bill of sale of the evidence he was improperly allowed to introduce; and we are of opinion that he has no ground of exception that these rulings were not made. Because he had succeeded, under objection, in introducing incompetent evidence, he was not entitled to except because the court did not give it the force he claimed for it.

The court without doubt ruled that the measure of damages was the value of the property at the time of conversion. The sale to Sawyer constituted the conversion, and not the refusal to deliver the property to plaintiff upon a subsequent demand. The objection of the defendant that the existence of the goods at the time of demand had not been proved, and that the suit could not be maintained, because at the time of the conversion (probably meaning demand) the defendant had no pos-

session of the goods, or control over or interest in them, does not require notice.

There was evidence for the consideration of the court, upon the question of value, in the particular description of the property and the

consideration recited in the bill of sale, and the fact that the defendant had sold the property. The weight of this evidence is not for us to determine.

Exceptions overruled.

GOULD et al. v. STEIN et al.

(22 N. E. Rep. 47, 149 Mass. 570.)

Supreme Judicial Court of Massachusetts,
Suffolk. Sept. 4, 1889.

Exceptions from superior court, Suffolk county; ROBERT C. PITMAN, Judge.

Action by Henry A. Gould and others against Abe Stein and others for breach of warranty on the sale of certain rubber. Judgment for plaintiffs. Defendants except.

J. B. Warner and H. E. Warner, for plaintiffs. *J. H. Dougherty and G. A. King*, for defendants.

C. ALLEN, J. The determination of this case depends upon the construction to be given to the bought and sold notes, which were similar in their terms. It does not admit of doubt that these notes were intended to express the terms of the sale. They were carefully prepared and were read to the parties line by line, as they were written. Of course all the existing circumstances may be looked at, but the contract of the parties is to be found in what was thus written, when read in the light of those circumstances. The goods respecting which the controversy has arisen were a certain lot of rubber which the defendants had on hand, and which could be identified. The transaction was a present sale, and not an agreement to deliver rubber in the future. The defendants now contend that the contract was executory, and that, if there was any warranty, there was none which survived the acceptance of the goods by the plaintiffs; but the argument that it was not an executed present sale finds no support in the bill of exceptions, and no such point was taken at the trial; and there is no occasion to consider the further question whether, in case of an executory agreement to sell, a warranty will survive the acceptance of the goods. The bought note, which the plaintiffs put in evidence, was of "148 bales Ceara scrap rubber, as per samples, viz., 46 bales of first quality marked 'A'; 102 bales of second quality." The controversy relates only to the 102 bales. It appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The court also found that Ceara rubber of second quality is well known in the market as distinct from a third or inferior grade; and there was evidence which well warranted this finding. The parties in their contract recognized the existence of different grades or qualities, though all of the rubber properly classified as of first quality or of second quality might not be of an exactly uniform standard or grade.

The plaintiffs at the trial claimed damages merely on the ground that the 102 bales were not of second quality, and made no claim of inferiority to the samples shown, as a distinct ground, but waived all claim founded on the exhibition of samples, and the court found damages for the plaintiffs

solely on the ground that the defendants failed to deliver rubber of the second quality; ruling that the broker's note contained an absolute warranty of second quality rubber. If this ruling was right, it disposes of the defendants' second and third requests for instructions. The general rule is familiar and admitted that a sale of goods by a particular description imports a warranty that the goods are of that description. *Henshaw v. Robins*, 9 Mete. 83; *Harrington v. Smith*, 138 Mass. 92; *White v. Miller*, 71 N. Y. 118; *Osgood v. Lewis*, 2 Har. & G. 495; *Randall v. Newson*, L. R. 2 Q. B. Div. 192; *Jones v. Just*, L. R. 3 Q. B. 197; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Bowes v. Shand*, L. R. 2 App. Cas. 455. And where goods are described on a sale as of a certain quality, which is well known in the market as indicating goods of a distinct, though not absolutely uniform, grade or standard, the description imports a warranty that the goods are of that grade or standard. In such cases, the words denoting the grade or quality of the goods are not to be treated as merely words of general commendation, but they are held to be words having a specific commercial signification. Thus, in *Hastings v. Lovering*, 2 Pick. 214, the words, on a sale note, "Sold Mr. E. T. Hastings 2,000 gallons prime quality winter oil," were held to amount to a warranty that the article sold agreed with the description; and in *Henshaw v. Robins*, 9 Mete. 87, it was said that the doctrine laid down in that case has ever since been considered as the settled law in this commonwealth. So in *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203, it was held that where a manufacturer of flour marked it as of a particular quality, viz., "Trafalgar Mills Extra Superfine," it amounted to a warranty of its being of such a quality. A similar doctrine may be found in *Hogins v. Plympton*, 11 Pick. 97; *Winsor v. Lombard*, 18 Pick. 57, 60; *Foreheimer v. Stewart*, 65 Iowa, 593, 22 N. W. Rep. 886; *Mader v. Jones*, 1 N. S. Law R. 82. In *Gardner v. Lane*, 9 Allen, 492, 12 Allen, 39, it appeared that the statutes provided for the preparation, division into different qualities, packing, inspecting, and branding of mackerel, and it was held that if a certain number of barrels of No. 1 mackerel were sold, and by mistake barrels of No. 3 mackerel were delivered, no title passed to the purchaser, and that the barrels of No. 3 mackerel thus delivered by mistake might be attached as property of the vendor, and that each different quality, after being thus prepared for market, was to be regarded as a different kind of merchandise, so that no title passed to the vendee; there being no assent on the part of the vendee to take the No. 3 mackerel in place of those which he agreed to buy.

Now, if the words "as per samples" had not been in the bought note, it would be quite plain that the present case would fall within the ordinary rules above given. But the insertion of those words raises the inquiry

whether they limit the implied warranty of the vendor, so that if the rubber sold was equal in quality to the sample he would be exonerated from liability, though it was not entitled to be classed as of the second quality. If no other meaning could be given to the words "as per samples" except that they alone were to be considered as showing the quality of rubber to be delivered, the argument in favor of the defendants' view would be irresistible. So if there was a plain and necessary inconsistency between the two descriptions of the rubber, it might perhaps be successfully contended that the vendor's obligation was only to deliver rubber which would conform to the inferior quality described; that is to say, that in case of such inconsistency, the words "as per samples" should prevail, and the words "of second quality" be rejected. If it were to be held that the vendor's obligation was fulfilled by delivering rubber of a quality equal to the samples, though it was not of the second quality, then the words "of second quality" would mean nothing, or they would be overborne by the words "as per samples." But if it is found that the bought note admits of a reasonable construction by which a proper significance can be given both to the words "as per samples" and also to the words "of second quality," there will be no occasion to disregard either. Cases are to be found in the books where such a construction has been given to contracts of sale. Thus, in *Whitney v. Boardman*, 118 Mass. 242, a sale of Cawnpore buffalo hides, with all faults, was held to mean with such faults or defects as the article sold might have, retaining still its character and identity as the article described; and the court cited with approval the case of *Shepherd v. Kain*, 5 Barn. & Ald. 240, where there was a sale of a copper-fastened vessel, to be taken "with all faults, without allowance for any defects whatsoever," and this was held to mean only all faults which a copper-fastened vessel might have, the court saying by way of illustration: "Suppose a silver service sold with all faults, and it turns out to be plated." So, in *Nichol v. Godts*, 10 Exch. 191, an agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," was held to be not complied with by the tender of oil which was not foreign refined rape oil, although it might be equal to the quality of the samples. The decision of this case has stood in England, though not without some questioning at the bar. See *Wieler v. Schilizzi*, 17 C. B. 619; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Mody v. Gregson*, L. R. 4 Exch. 49; *Jones v. Just*, L. R. 3 Q. B. 197; *Randall v. Newson*, L. R. 2 Q. B. Div. 102. In the present case, by a fair and reasonable construction of the bought note, effect can be given to both of the phrases used to describe the rub-

ber. Construed thus, the article sold was 102 bales of Ceara rubber, of the second quality, and as good as the samples. The rubber delivered was in fact Ceara rubber. There was no question that it was of the right kind; but it was not of the second quality. There is no necessity to disregard the words describing the rubber as of the second quality. They signified a distinct and well-known, though not absolutely uniform, grade of rubber. There was no exact standard or dividing line between rubber of the second quality and of the third quality, any more than there is between daylight and darkness. But nevertheless a decision may be reached, and it may be easy to reach it in a particular case, that certain rubber is or is not of the second quality. This general designation being given, the specification "as per samples" being also included in the note, the rubber must also be equal to the samples. It must be rubber of the second quality, and it must be equal to the samples. If it fails in either particular, it is of no consequence that it conforms to the other particular. There is no inconsistency in such a twofold warranty; and, this rubber having been found to be not of the second quality, the warranty was broken, without regard to the question whether or not it was equal to the samples.

The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should conform to that description. *Henshaw v. Robins*, 9 Metc. 83; *Jones v. Just*, L. R. 3 Q. B. 197. And the exhibition of a sample is of no greater effect than the giving of an opportunity to inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the goods shall reasonably answer the description given, in its commercial sense. *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Mody v. Gregson*, L. R. 4 Exch. 49; *Nichol v. Godts*, 10 Exch. 191. In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.

The point urged in the defendants' argument, that the plaintiffs' remedy was destroyed by their acceptance of the goods, was not taken at the trial, and no ruling was asked adapted to raise the question as to the effect of such acceptance. For these reasons, in the opinion of a majority of the court, the entry must be: Exceptions overruled.

FIELDER v. STARKIN.

(1 H. BL. 17.)

Court of Common Pleas, Trinity Term, 1788.

This was an action on the warranty of a mare, "that she was sound, quiet, and free from vice and blemish."

Plea, non-assumpsit, on which issue was joined.—

The cause came on to be tried at the last assizes at Thetford, before Mr. Justice Ashurst, and a verdict found for the plaintiff. It appeared on the trial, from the learned judge's report, that the plaintiff had bought the mare in question of the defendant at Wimmel fair, in the month of March, 1787, for 30 guineas, and that the defendant warranted her sound, and free from vice and blemish.—Soon after the sale, the plaintiff discovered that she was unsound and vicious (a), but kept her three months after this discovery, during which time he gave her physic and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, the plaintiff kept her till the month of October 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable, the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound a full twelve-month before her death. It also appeared that the plaintiff and defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstances of her being unsound. The jury found a verdict for the plaintiff with 30 guineas damages.

Adair, Serjt., shewed cause. Le Blanc, Serjt., in support of the rule.

Lord LOUGHBOROUGH—Where there is an express warranty, the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been at that

time unsound, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return or notice. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the original seller, to recover the difference of the price. In the present case it appears from the evidence of the farriers who saw the mare opened, that she must have been unsound at the time of the sale to the plaintiff.

GOULD, J.—Of the same opinion, remembered many cases of express warranty, where a return was not held to be necessary.

HEATH, J.—If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

WILSON, J.—Of the same opinion, recollected a cause tried before Mr. Justice Buller at nisi prius, where the defendant had sold the plaintiff a pair of coach horses and warranted them to be six years old, which were in reality only four years old. It was contended that the plaintiff ought to have returned the horses; but Mr. Justice Buller held that the action on the warranty might be supported without a return.¹ As to part of the evidence being contrary to the verdict, the jury have a right to use their discretion either in believing or disbelieving any part of the testimony of witnesses.

Rule discharged.

¹ See *Towers v. Barrett*, 1 Term R. p. 136, and *Buchanan v. Parnshaw*, 2 Term R. 745.

BAUMANN v. MANISTEE SALT & LUMBER CO.

(53 N. W. 1113, 94 Mich. 363.)

Supreme Court of Michigan. Dec. 23, 1892.

Error to circuit court, Manistee county; J. Byron Judkins, Judge.

Action by Max Baumann, administrator of the estate of Ann McCormick, deceased, against the Manistee Salt & Lumber Company, insolvent. Judgment for defendant. Plaintiff appeals. Affirmed.

McAlvay & Grant, for appellant. Uhl & Crane, for appellee.

GRANT, J. Ann McCormick filed a claim against the defendant, which was insolvent, and whose estate was in the hands of receivers. The receivers contested the claim. Two trials were had. Upon the first, Mrs. McCormick was a witness in her own behalf. A new trial was granted, and before the second trial she died. Her testimony was received in evidence upon the second trial. The claim is based upon three promissory notes executed by M. Englemann to the order of Mrs. McCormick, and aggregating \$2,700. The court directed a verdict for the defendant. At the time these notes were given, Englemann lived in Manistee, and was reputed to be a man of great wealth. Upon the face of the notes, there is nothing to connect the defendant with them. Englemann died before two of the notes became due, and his estate proved to be insolvent. Mrs. McCormick presented these notes in the probate court against his estate, and they were allowed. Failing to obtain her money against that estate, she presented a claim against the company. Mr. Englemann was president of the company. It is apparent from this record that she loaned the money to Mr. Englemann, and, at the time the loans were made, she did not understand that she was loaning it to the defendant. It is now sought to make the defendant liable on the ground that the money was received by it, and to show this by certain entries upon its books. The money, in the first instance, was loaned upon the credit of Mr. Englemann. The defendant's liability, if any, was therefore collateral, and its promise must be evidenced in writing, signed by it. How, St. § 6185; *Ruppe v. Peterson*, 67 Mich. 437, 35 N. W. 82, and authorities there cited. A writing which is relied upon to take the promise out of the statute must contain all the terms of the contract. Such promise cannot rest partly in parol and partly in writing. *Hall v. Soule*, 11 Mich. 494; *Ayres v. Gallup*, 44 Mich. 13, 5 N. W. 1072. Under these authorities, the evidence of Mrs. McCormick as to conversations between Mr. Englemann and herself, or be-

tween herself and any other officer of the corporation, for the purpose of connecting the entries upon defendant's books with the notes, was incompetent. Her conversation with Englemann was also incompetent, under 3 How. St. § 7545; since he was an officer of the corporation.

Mr. Englemann was a member of several other firms, and was also engaged in an extensive business of his own. He borrowed money from the defendant to a large amount, and paid moneys to it from time to time. An account of these receipts, and payments by him, was kept upon defendant's books under the head of "M. Englemann, General." At his death the amount due the company on this account was \$80,000. An account was also kept on the defendant's books under the head of "M. Englemann." Upon this account were entered his family expenses, and similar personal items. Mr. Englemann also kept a private cash book and journal, upon which were entered up these notes, as those for which he was personally liable. The entries under the head of "M. Englemann, General," which are relied upon by the plaintiff, are as follows: "M. Englemann, General. His note to Mrs. Ann McCormick 2-5 one year, 7 per cent.; taken up his demand note 10th, 2nd, \$600 currency from her first; total, \$400; total, \$1,000." "M. Englemann, General. Received from Mrs. Ann McCormick, against his bills payable, No. 579 first 29 six months, 7 per cent." "M. Englemann, General. Bill payable 7-9, one year from date, Mrs. McCormick first, \$700." The items received upon these notes appear upon defendant's cash account to the credit of Mr. Englemann. These entries do not show that Mr. Englemann borrowed this money as the agent of the defendant, and for its benefit. The natural inference is that he borrowed on his own account, and placed it to his credit on the books of defendant, to which he was largely indebted. The defendant was not, therefore, an undisclosed principal. As already stated, parol evidence was incompetent to show that the notes were in fact the notes of the company. *Bank v. Filer*, 83 Mich. 496, 47 N. W. 321; *Insurance Co. v. Covell*, 8 Mete. (Mass.) 442; *Fuller v. Hooper*, 3 Gray, 334; *Jones v. Phelps*, 5 Mich. 218; *Kelsey v. Chamberlain*, 47 Mich. 241, 10 N. W. 355; *Finan v. Babcock*, 58 Mich. 301, 25 N. W. 294.

There is nothing in the case on which to

13 How. St. § 7545: "And, when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation."

apply the doctrine of estoppel. The benefit to the defendant was not received directly from Mrs. McCormick, but from Englemann, who had loaned the money from her. By the transaction, defendant became Englemann's debtor, as to these moneys, and became in no sense her debtor. Judgment affirmed. The other justices concurred.

FRANCIS v. BARRY.

(37 N. W. 353, 69 Mich. 311.)

Supreme Court of Michigan. April 13, 1888.

Appeal from circuit court, Kalamazoo county.

Action by Harriet Francis against Charles H. Barry, Jr., for damages for breach of contract to convey certain real estate. Judgment for plaintiff and defendant appeals.

H. H. Riley and Howard & Roos, for appellant. D. Boudeman, for appellee.

CHAMPLIN, J. This action was brought to recover damages for a breach of contract made by the defendant with the plaintiff, by which he agreed to sell and convey to her a certain store property situated in the village of Schoolcraft, in the county of Kalamazoo, Mich., for the consideration of \$2,500.—\$2,000 to be paid down in cash, and the balance by her note of \$500, to be paid by the rent of the store as it accrued, at the rate at which it was being rented, to-wit, \$400 per year, and which was payable in monthly installments. The declaration sets up that the contract is in writing, and consists of letters written between the parties on and prior to July 1, 1886; that the defendant claimed to be the owner of the real estate described in the first count of the declaration as "a strip of land twenty-six feet wide, off of the north side of the north-west quarter of lot No. one hundred and thirty-two (132.) and also the north-east quarter of the same lot, excepting a strip twenty-two (22) feet wide on the south side of the last-named parcel, according to the recorded plat of the village of Schoolcraft, always reserving from the north side of both parcels an undivided one-half of the wall, and the land on which it stands," and generally known as the "Schoolcraft store," and the "Schoolcraft-store property." The declaration also alleges that, at the request of defendant, the completion of said agreement by the parties was extended until, to-wit, September 15, 1886, when defendant ascertained he had no title to the property, but that the same was in Charles H. Barry, Sr., father of defendant; and defendant stated that he would procure a deed from his father, to be made to plaintiff, of said property, within a reasonable time after said 15th day of September and requested plaintiff to allow him a reasonable time to procure such deed which plaintiff consented to do. Plaintiff avers that at all times from said July 1, 1886, until November 18, 1886, she was ready to accept from defendant a deed of the said premises, and pay defendant the amount which she had agreed to pay him, as aforesaid, and so notified defendant at several times; and within a reasonable time after said 15th day of September, 1886, she so notified the defendant, and offered to carry out her contract with him, and requested him to carry out said contract with her, and convey, or cause to be conveyed, to her said property; that defendant did not nor would, within a reasonable time after July 1, 1886, nor within a reason-

able time after September 15, 1886, carry out his said contract, or convey, or procure to be conveyed, to plaintiff the said premises; but, before said reasonable time had elapsed, said defendant sold the premises to one William Roberts, and procured a deed thereof to be made to him by said Charles H. Barry, Sr., for a consideration of \$3,000; and by reason thereof said defendant placed it beyond his power to carry out his contract with plaintiff, and by that act excused plaintiff from making any formal tender of the purchase money to him, although plaintiff was ready and willing, and offered, to pay the same to defendant as soon as he would have made to her such a conveyance as he agreed to make. The law appears to be well settled that a complete and binding contract may be created by letters, or other writings, relating to one connected transaction, if, without the aid of parol testimony, the parties, the subject-matter, and the terms of the contract may be collected. *Allen v. Bennett*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bing. 9; *Dobell v. Hutchinson*, 3 Adol. & E. 355; *Jones v. Williams*, 7 Mees. & W. 493; *Telegraph Co. v. Railroad Co.*, 86 Ill. 246; *Moore v. Monmouth*, 61 Mo. 424; *Abbott v. Shepard*, 48 N. H. 14. The plaintiff recovered judgment in the court below, and defendant brings the case into this court by writ of error, and insists that the judgment ought to be reversed for the following reasons: "(1) Because the plaintiff failed to show a sufficient description of the property; (2) because she failed to show a sufficient contract, in writing, to take the case out of the statute of frauds, and for the reason that the minds of the parties never met in contract relations; (3) because, all the evidence there was in the case bearing on the contract being undisputed, the court erred in submitting it to the jury to determine whether or not there was a contract; there was nothing in the case to submit to a jury; (4) there was error in the admission of other evidence to which we will specifically call the attention of the court." The correspondence is too lengthy to warrant us in setting it forth in detail. It consisted of letters written to and from the defendant. Those written to defendant were, for the most part, written by plaintiff's husband, and, as she testifies, at her request; and the replies to such letters were addressed to him by the defendant. As no question is made as to his authority to so act for plaintiff, but the correspondence conducted by him has been treated throughout as hers by both parties, we shall so regard it. Notice was given to the defendant to produce the letters written by and on behalf of the plaintiff upon the trial of the cause, and, upon being requested so to do upon the trial defendant's counsel replied: "We have some of them, and some of them have been destroyed." No explanation was given of the reason why, or the circumstances under which, they were destroyed, or by whom. No great lapse of time occurred during which they might become lost as deemed unimportant. The correspondence closed in

the fall of 1886, and this suit was commenced soon after, and was tried in June, 1887. He was apprised by a letter from her of date October 8, 1886, to which he replied under the same date, that she was advised that his letter made out a contract of sale, and hence he would see the importance of preserving the correspondence so far as it was in his hands, especially if it failed to show what was the subject-matter of the sale. The plaintiff was under the necessity of resorting to secondary evidence of that portion of the contract. And if there should be any discrepancy between the parties in their testimony regarding the contents of such letters as he received, and failed to produce, the presumption, from the fact of his having destroyed testimony in his hands, would be against his assertion, and in favor of hers, which the jury would be entitled to consider when weighing their testimony. The correspondence starts with a letter written by the plaintiff to defendant, asking him if he would sell that Schoolcraft store for \$3,000, and take \$1,000 in goods; to which he replied, under date of December 22, 1884: "I will sell the property for \$3,000, but I can't take goods. We have a big stock, and are trying to reduce it, but it is slow business. Can you tell me any one who will let me have \$2,000 on the property. I would like to raise that amount. Please let me know, and oblige." She afterwards wrote offering him \$2,500 for the store,—\$2,000 in money, and \$500 in notes, and apply the rent on the notes. He replied August 26, 1885, saying that he could not sell that property for less than \$3,000, and that it seemed to him that she would do well to buy it at that price, and offering to take \$2,500, and her note for the other \$500, and count the rent against it of the lease, which would pay more than half of it. Plaintiff again wrote him, offering him \$2,000 in money, and her note for \$500, and let the rent apply on the note; to which he replied September 7 or 9, 1885, as follows: "I will sell you that property for what you offer, if you give me the rent until April 1st. I want to sell it. I have no time to attend to it, or look after it. It's cheap, I am sure, and thought I never would sell for that; but I think it's best to let it go, if I can get that for it." To this plaintiff replied, October 8, 1885: "Will say to you that I will take the property as soon as I can raise the money. Think I can in a few weeks. I talked with Mr. Hoyt yesterday. He told me he thought he could raise the money for me." No contract seems to have been consummated between the parties up to this time. The next containing anything is a part of a letter produced by plaintiff, which is dated November 10, 1885, and contains a part of a sentence written by defendant: "I hope you will take the property and * * *". The balance of the letter plaintiff testifies is lost. The matter continued thus until March 1, 1886, when defendant wrote: "I expected to hear from you before this time, or see you. Do you think you will take the property? Please let me know, and oblige."

To this plaintiff replied that she would raise the money as soon as possible, by the fore part of April, she thought. He waited until May 10, 1886, when he wrote again: "Is it expected that you will take the property soon? I must sell it, or raise some money on it, soon. If you cannot raise the whole I will take \$2,000, and rent for the rest." Plaintiff does not testify that she made any response to this letter; and May 14, 1886, defendant writes plaintiff's husband: "I supposed until yesterday that the store at Schoolcraft was rented, when Mr. Robbins sent word to know if I would sell it to him." He tells him that he is going home the next Monday to be gone two or three weeks; that he had sent word to Mr. Robbins that he would sell, or that he could talk to Mr. Francis about it; that he told him he thought the property could be bought for about \$3,000 and payment down. The plaintiff replied to this that the store was already rented to good, responsible parties, and that she thought it was better that it should remain as it was; that she wrote him that she would have the money in a few days. On the 17th of May, 1886, defendant wrote to D. H. Francis: "Your letter received, and all satisfactory. * * * So it is all right, and, when you can raise the money, I will take it. I shall be gone about two weeks. Let all stand as it is until I get back. Raynerstown is my address." Up to this time it will be seen that no bargain had been concluded. While the terms had been agreed upon, still it was held in abeyance, and depending upon plaintiff's raising the \$2,000 to be paid down. She was not in a position to perform, or ask performance. Plaintiff made her arrangements to raise the money by a loan upon the property from a Mr. Seaman, who resided in New York, through Judge Stearns of Kalamazoo, and the money arrived for that purpose in Kalamazoo on the 18th of May, 1886. Plaintiff thereupon wrote defendant before he left for New York, notifying him that the money was ready. He replied from Raynerstown, N. Y., May 21, 1886: "Yours just received, and I am glad to hear of your success in raising the money. I need it very much. I shall be back the last of next week, or the fore part of the one following, and will let you know when I get there." Plaintiff then wrote him that the money was here, and she would like to have a deed, and have the papers delivered, and returned back. He replied as follows:

"Raynerstown, New York, July 1, 1886.

"Friend Francis: Your letter received,—came to-day. In answer will say I will give you a deed of this date, July 1, 1886, and take the rent up to that date, take \$2,000, and the notes for the balance and will attend to it just as soon as I get back, if satisfactory.

"Yours, etc.

C. H. Barry."

No written response was made to this letter, but the plaintiff let the matter rest, as requested by defendant. She arranged to hold the money so as to be able to carry out the contract on her part. He did not return

to Michigan as soon as he had expected. Plaintiff wrote him that the money was lying useless, and she regretted it, and defendant wrote her, under date of August 17, 1886: "I regret it all as much as anybody, for I have been paying 8 per cent. for the money, and need more at the bank all the time. But I could not get back sooner. Will be there sure by Monday or Tuesday, and perhaps Saturday. Will let you know." She wrote him again to know when he was coming up, and at what time he thought he would be here to arrange the matter; to which he replied, August 28, 1886: "Your letter came last night, and I intended to go up on the morning train, but missed it. I have looked everywhere for the deed you gave me, but cannot find it, but can get the description there. Please have the papers made out, and then we can fix the business up quick. * * * I will not be up until Monday morning on the early train, and must go back on the noon." Plaintiff, in accordance with this request, procured Mr. Stearns to prepare the papers, and had the deed and papers all prepared, and Mr. Barry came to Kalamazoo on the Monday, as he had appointed. On his arrival he ascertained that there was an undischarged mortgage upon the premises, and either at that time, or a few days later, he ascertained that the record did not show him to be the owner of the premises, but that the title of record was in his father. He insisted that he supposed that he was the owner, and stated that he must have a deed at home that had not been recorded, but he undertook to rectify the title. He did get the mortgage discharged of record, and directed his father to make a deed to defendant; but, on receiving offer of \$3,000 from another party, he directed his father not to execute the deed to defendant, but to the other party. He received \$1,500 of the purchase money from the purchaser, and took a mortgage for the balance running to him (the defendant.)

We are of opinion that a complete and binding contract is plainly deducible from the letters, and that they contain all the essential terms requisite to comply with the statute (section 6181, How. St.) It appears that the minds of both parties met upon the same terms. The offer embraced in the letter of July 1, 1886, so far as it contained new propositions, appears to have been unconditionally accepted and acted upon by the plaintiff, although there does not appear to have been any express acceptance in writing. The notes and manner of payment are made sufficiently certain, by implication, by reference to the preceding letters. No parol testimony is necessary to be resorted to in order to supply the essential terms of the contract. Concisely stated, the correspondence shows an offer by defendant to sell and convey to the plaintiff the property known as the "Schoolcraft-store property," for \$2,500,—\$2,000 in cash on delivery of deed, and two notes amounting to \$500, to be signed by plaintiff,

and payable from the rents of the property sold, the rent accrued to April 1st, the date which the deed was to bear, to be applied on the notes; and the acceptance of this offer by plaintiff is proved. This conclusion disposes of the second point raised by counsel for defendant.

Upon the first point raised, the writing contains a sufficient description to identify the property. The plaintiff had formerly owned the property, and had conveyed it to defendant's father, and defendant supposed that it had been conveyed to him, and plaintiff knew nothing to the contrary. Plaintiff's husband appears to have acted for defendant in renting the property, collecting the rent, and remitting it to defendant. And the description contained in the first correspondence as "the Schoolcraft store," and referred to by defendant in the same way, in his letter of May 14, 1886, is a sufficient designation to convey the property in a deed, and so described would convey the parcel of land, upon which the store stood, known, used, and occupied therewith. After having designated it in the correspondence as "the Schoolcraft store," the subsequent correspondence conveyed a definite meaning when it referred to it as "the property." Both parties understood what property was meant, and so would a stranger to the parties, and to the property, fully comprehend that the term "property" referred to and meant the Schoolcraft-store property.

The third point must be overruled. We hold, as a legal conclusion from the undisputed facts, there was a contract as alleged, and the court should so have charged the jury. But, the jury having found a verdict for the plaintiff, the defendant was not prejudiced by the error of the court. The fifth point is overruled. The sixth point refers to the ruling of the court upon the admission of testimony. There are 19 errors assigned upon rulings of this kind. Two of them relate to testimony which the court admitted relative to the item of \$60 interest which plaintiff paid for the use of the money she had arranged for, and which was held for her awaiting defendant's action, and the items of expense which plaintiff incurred in repairs upon the store while she was in possession, and in the expectation of obtaining the legal title, in accordance with her contract. The error, if any was committed, in admitting this testimony, (which we do not decide,) was corrected by the court in his charge to the jury. He instructed them that plaintiff could not recover for these items, and the amount of the verdict which the jury returned, shows that they obeyed the instruction of the court in that respect. The other errors assigned upon the admission of testimony are overruled; and, perceiving no error whatever in the errors assigned upon the record, the judgment is affirmed.

SHERWOOD, C. J., and MORSE and LONG, JJ., concurred.

AUSTRIAN & CO. v. SPRINGER.

(54 N. W. 50, 94 Mich. 343.)

Supreme Court of Michigan. Dec. 23, 1892.

Error to circuit court, Kent county; Allen C. Adsit, Judge.

Action by Leo Austrian & Co. against Nathan Springer for failure to deliver goods contracted to be sold by defendant to plaintiffs. There was a verdict in plaintiffs' favor, and defendant brings error. Affirmed.

The contract was entered into, on defendant's behalf, by Frank O. Fitton, a soliciting agent employed by defendant. At the trial, plaintiffs introduced evidence of a custom all over the country for such agents to accept orders without conference with their principals. The deposition of one Lisen, defendant's manufacturing agent, was also introduced in evidence. On cross-examination of this witness, plaintiffs sought to show that his order had not been filled because defendant had entered into a combination or association with other manufacturers not to sell goods to American houses for a certain time. On the subject of Fitton's authority to bind defendant, the court charged as follows: "When one employs another as his agent to sell goods or other property, and knows, as a matter of fact, that he, in so acting, assumes to make contracts with his customers absolutely binding on his principal, leaving no option on his part to repudiate or reject, leaving the agent clothed with apparent authority to make such contract, in the absence of any proof of limitation or restriction upon his authority, the presumption must prevail that the agent is acting within the scope of his authority, and the principal is bound by his acts. So that if you believe in this case, from the evidence, that the defendant had, prior to March 21, 1890, employed Fitton as his agent to sell German looking-glass plates in Chicago and elsewhere in the United States, and had clothed him with apparent authority to make contracts for the sale of such goods, and the plaintiffs had knowledge that he was so acting, then, in the absence of any proof of limitation or restriction on his authority, he must be presumed to have been a general agent of the defendant, clothed with power to accomplish the purpose of his agency, to wit, make contracts for the sale of goods, binding alike on the purchaser and the seller." "If you shall find that the defendant did clothe him with the apparent authority of a general agent for the purpose of making sales of his goods, he is bound by his acts, within the general scope of his authority, even though they may have been in violation of his instructions, if the plaintiffs had no notice of his instructions." "The presumption is that one known to be a general agent is acting within the scope of his authority, and a party dealing with him is not bound to make inquiry concerning such authority. While there is no proof of actual,

express authority given by defendant to Fitton to accept orders for glass, yet the jury have the right to infer such authority, and such express authority, from the evidence in the case, if, to the minds of the jury, the evidence convinces them that such authority was given." "The evidence of defendant's knowledge may be derived from the acts of the parties, proved to have taken place between them, relating to the business of the agency, if such acts convince you that such authority was given or was not given." "The question is not, what was the authority actually given? but, what was the party dealing with the agent justified in believing the authority to be?" "If you find that the defendant put his price list of these goods in the hands of Fitton for the purpose of enabling him to sell them, that would amount to an implied authority to him to sell them, no notice of the contrary being shown or appearing; and, unless he did sell them in other than the usual manner, the plaintiffs were not under obligation to inquire as to the agent's authority. If he did sell them in an unusual manner—or offered to—to the plaintiffs, that fact should have put them on inquiry, and thereby to have obtained knowledge of the limited agency of Fitton, if in fact his authority was limited." "In order to hold the defendant liable, under the facts of this case, for the acceptance by Fitton of the order given by the plaintiffs, if made in good faith and the exercise of reasonable care on the part of plaintiffs, it is not necessary that the plaintiffs establish a custom on the part of the soliciting agents to accept orders." "Unless you find that such custom prevailed generally, was certain and reasonable, you cannot find that Fitton's authority to bind the defendant was enlarged by any usage of this particular trade or local custom prevailing at Chicago or elsewhere, unless you find that defendant had knowledge of such local custom, and, in order to show defendant's knowledge of such custom, it is not necessary to produce direct proof on the subject. The jury have the right, if they think the evidence warrants it, to infer such knowledge from the defendant's relations to and knowledge of the trade, and from all the evidence in the case."

John T. Miller and Taggart, Wolcott & Ganson, for appellant. Stuart & Knappen, for appellees.

McGRATH, C. J. Plaintiffs are manufacturers of furniture, at Chicago, Ill., and defendant is a manufacturer of glass at Fuerth, Bavaria. On the 21st of March, 1890, one Frank O. Fitton called at plaintiffs' office, gave to plaintiffs' manager a card as agent of defendant; "said he came to sell me German looking-glass plates for importation; that he was selling for defendant,—and quoted prices;" and after some negotiations plaintiffs signed a written order drawn up by Fitton, which is as follows: "[Letter head-

ing of Leo Austrian & Co.] Chicago, March 21, 1890. Nathan Springer, Fuerth, Bavaria.—Dear Sir: Please enter our order for following German looking-glass plates; same to be shipped as soon as possible,—not later than May 15th,—and f. o. b. Chicago; freight to be prepaid to New York, and duty and freight from New York to be paid by consignee, and deducted from invoice. [List given.] Terms and discount: 60—10—2½ on plain; 60—10—5—2½ on beveled. The size 10½ by 17, beveled, being quoted at net 37½ cents, f. o. b. Chicago. Net 60 and 90 days. Leo Austrian & Co.” Fitton drew up, signed, and delivered to plaintiffs, the following: “[Letter head of Leo Austrian & Co.] Chicago, March 21, 1890. Ordered from Nathan Springer, Fuerth, Bavaria, following German mirrors, to be shipped soon as possible,—not later than May 15. Terms, f. o. b. Chicago. Net 60 and 90 days. [List of glass, prices, terms, and discounts, same as in order signed by plaintiffs.] Frank O. Fitton, Agent.” Fitton said he would accept the order. The discounts were from list prices. Plaintiffs had a price list, on which Fitton gave the discounts. The defendant did not deliver the goods. About May 1, 1890, plaintiffs received from defendant the following letter: “[Letter head of N. Springer.] Fuerth, Bavaria, April 15, 1890. Mess. Leo Austrian & Co., Chicago, Ill.—Gentlemen: Your valued order March 21st, duly to hand, and regret not to be able to execute it in the time specified. Hoping to hear from you later, I remain, truly yours, N. Springer.” Leo Austrian says: “Upon receipt of that letter, I wrote to defendant. I suppose my letter was sent out of the office as all the mail is. The letter copy book was accidentally destroyed. Up to the 1st day of July, I expected that the order would be filled. On June 28, 1890, I placed an order in New York. They would give me no price at the time, but the order was placed subject to July prices.” This suit is brought to recover the difference between the prices named in the order given to Fitton and the prices paid. Plaintiffs recovered, and defendant appeals.

The first question raised is that the evidence fails to show a contract between the parties: (1) The order signed by plaintiffs and the paper signed by Fitton do not constitute a contract; and (2) it does not appear in evidence that Fitton had authority to make a binding contract. These two propositions practically resolve themselves into one; for, if Fitton had authority to bind defendant, the procurement and receipt of the order was sufficient, in itself, to create a contract. *Kessler v. Smith*, (Minn.) 44 N. W. Rep. 794. In that case the order was solicited at St. Paul, Minn., by one of the firm, and was addressed to the firm at New York. In *Heffron v. Armsby*, 61 Mich. 505, 28 N. W. Rep. 672, a memorandum of sale was signed by the purchaser only, and delivered to the soliciting agent.

It was held that, if the agent was authorized to act for the vendor, the memorandum was sufficient to satisfy the statute of frauds. In addition to the receipt of the order by the agent, the agent executed an acknowledgment, “Ordered from Nathan Springer,” etc., and signed it, “Frank O. Fitton, Agent.” This cannot be treated as a mere receipt for an order, nor is it an acknowledgment of a request to enter an order, but rather an acknowledgment of the entry of the order signed by Fitton as agent for his principal.

As to the authority of the agent, there is no evidence of any limitation upon his powers. It appears that he was the agent of defendant. He was in defendant’s employ, and sent out for the express purpose of taking orders for glass. He was a resident of the United States, and was employed by letter. He held himself out as an agent, and that to defendant’s knowledge. In his correspondence with his principal, he wrote upon a letter head in which his name appeared as “manufacturer’s agent.” The only question that can be raised under this record is as to the extent of his authority. Parties dealing with an agent have a right to presume that his agency is general, and not limited. *Methuen Co. v. Hayes*, 33 Me. 169; *Trainer v. Morrison*, 78 Me. 160, 3 Atl. Rep. 185. And the presumption is that one known to be an agent is acting within the scope of his authority. *English v. Ayer*, 79 Mich. 516, 44 N. W. Rep. 942. Plaintiffs went further. Evidence of persons who had dealt with defendant through this agent was introduced to show the character of his agency. This was competent. *Heffron v. Armsby*, supra; *Haughton v. Maurer*, 55 Mich. 323, 21 N. W. Rep. 426; *Gallinger v. Traffic Co.*, 67 Wis. 529, 30 N. W. Rep. 790. One Selkin testified that he had known defendant since January, 1889; that for three years the firm of which he was a member had been buying glass from defendant,—a part of that time through Fitton; that orders had been given by his firm, through Fitton, in July, 1889, September, 1889, and February, 1890. In December, 1889, witness received an invoice from defendant of the September order, on the heading of which was printed the words, “Agents are not authorized to collect or receive money on my account.” The witness says, further: “Mr. Fitton solicited, in person, the order, which I handed to him personally, and the order mailed to him was solicited by him, in person, during the same time we purchased goods direct from the defendant, Springer. The defendant mailed us two price lists, and Mr. Fitton has at divers times made quotations verbally to us. I have other bills showing sales from Springer to H. Lieber & Co., either verbally or through correspondence, but am unable to fix any dates as to when such orders were given.” One Pugh testified that he had acted as agent for defendant, Nathan Springer. That on the 15th day of May, 1890, he became the partner of Warren C.

Dewey, who was at that time the agent at Grand Rapids for the defendant, for the sale of his products. That the agency ended on the 1st of July, 1890, by reason of Nathan Springer's entering into a pool, in consequence of which he could not sell to parties outside of the combination. "We were authorized to take orders for the defendant for German looking-glass plates." That "we were in the habit of accepting orders without submitting them to the defendant, except in cases where a new account was opened, when the name was referred by us to the financial agent at New York of the defendant, for the purpose of ascertaining the financial standing of such new customer, in such cases, where the standing of such new customer was doubtful. The defendant knew of this habit, and filled orders that were sent to him. We were apprised of the prices at which we were authorized to make sales either by cablegram or by letter. I do not know Frank O. Fitton. I do not know whether he was an agent of the defendant, but I know he was reputed to be, and was generally acknowledged to be such an agent, among the trade." It is well settled that the authority of the agent must depend, so far as it involves the rights of innocent third persons, who have relied thereon, upon the character bestowed, rather than the instructions given. In other words, the principal is bound to third persons, acting in ignorance of any limitations, by the apparent authority given, and not by the express authority. *Mecham*, Ag. 283. The question is not, what was the authority actually given? but, what was the plaintiff, in dealing with the agent, justified in believing the authority to be? *Price v. Earl of Torrington*, 1 Amer. Lead. Cas. 567, 568; *Griggs v. Selden*, (Vt.) 5 Atl. Rep. 594; *Insurance Co. v. Pierce*, 75 Ill. 426; *Packet Co. v. Parker*, 79 Ill. 23; *English v. Ayer*, 79 Mich. 516, 44 N. W. Rep. 942. Whatever attributes properly belong to the character bestowed will be presumed to exist, and they cannot be cut off by private instructions of which they who deal with the agent are ignorant. Among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created. *Mecham*, Ag. 647; *Tobacco Co. v. Jenison*, 48 Mich. 459-462, 12 N. W. Rep. 655. Parties sent out by manufacturers to solicit orders are held out to the trade as having authority to act according to the general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury. In the present case the principal was removed thousands of miles from the customer, at a point where, in the ordinary course of mail, it would take from four to six weeks to exchange letters. We find no error in the instructions given upon the point discussed.

The second and third assignments of error relate to the admission of testimony tending to show a custom in selling glass to furniture manufacturers—First, as to the means of making such sales; and, second, as to the acceptance of orders by agents making the sales. The evidence was objected to, unless coupled with a proposal to bring home to the defendant knowledge of such custom. One of the witnesses had resided in Grand Rapids; was then a resident of Chicago; had, while at Grand Rapids, acted as agent for defendant; and, while such agent, had habitually accepted orders without conference with defendant, and to his knowledge. Another witness was a resident of Chicago, but had been connected with a firm of manufacturers and importers of looking-glass, having their place of business in New York, and their factories at Fuerth, Bavaria. Another was a salesman, engaged in Illinois and Wisconsin, selling mirrors as agent for foreign manufacturers. Another witness was a member, at Indianapolis, of a firm dealing in mirror glass, and had been connected with the firm for 22 years. For 3 years the firm had been buying mirror plates from defendant, and several orders had been given through Fitton, as agent for defendant. This evidence tended to show that the custom was not a purely local one, but one that prevailed generally. The rule is that the custom must be one so well settled and notorious as to raise the presumption that it was known to buyer and seller. *Mecham*, Ag. 348. This presumption was not, therefore, rebutted by defendant's testimony that he was not aware of such custom, although it might have been, had the custom been shown to have been a purely local one. This was shown to be a general custom pertaining to the glass trade in this country, and not confined to any particular locality, as was the case in *Pennell v. Transportation Co.*, 53 N. W. Rep. 1049, decided at the present term.

Upon the question of damages, it is insisted that immediately after the receipt of defendant's letter, or in the early part of May, the advance in the price of glass was but light, and that plaintiffs should have at that time supplied themselves, but, instead of so doing, they waited until the latter part of June, at which time the advance was much greater. The general rule is that the measure of damages for a breach of contract to sell and deliver personal property, when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery. *Haskell v. Hunter*, 23 Mich. 305; 2 Sedg. Dam. 365. The goods were to be delivered at Chicago, and were to be shipped not later than May 15th. In the ordinary course it would take from 30 days to 2 months for them to arrive at Chicago. The times of payment fixed by the contract were net 60 and 90 days after delivery at Chicago. The plaintiff testified that he placed

a number of orders during the month of June, but that the parties refused to ship the goods. There was abundant testimony tending to show that dealers declined and evaded contracts or shipments during that month, in expectation of an advance in prices. He says: "I tried to make larger purchases in June. I tried to buy of Mr. Hart and Mr. Gloecker, and I went myself to New York, personally, to buy. I could not get glass. They gave me prices all right, but, when I inquired for such sizes as I needed in my business, they uniformly said: 'We have not got them now. Wait a few weeks, and we will give them to you.'" Referring to certain New York houses, he says, further: "I believe those were the only four houses in New York that I had any dealings with, and I tried to buy glass of them at that time. I made an effort to buy glass, and they uniformly told me that they had none for sale just now; to wait a few days, and I could have all the glass I wanted." He placed an order on June 27th, but it was taken subject to the July advance. One of defendant's witnesses testifies that he gave an order to defendant in the latter part of May, and it was declined. It was held in *Goodrich v. Hubbard*, 51 Mich. 62-70, 16 N. W. Rep. 232, that, the plaintiff not having elected to consider the contract broken before the arrival of the time for its full performance, he was entitled to the difference in value as of that time. See, also, *Schmertz v. Dwyer*, 53 Pa. St. 335; *Kribs v. Jones*, 44 Md. 398.

The court instructed the jury that plaintiffs were entitled to wait a reasonable time for the goods to reach Chicago, after the final date of shipment, and in this we think there was no error. It is very evident from this record that there was, in fact, no market price for mirror glass during any time in the month of June, and under the testimony the goods could not have reached plaintiffs before some time in that month.

The testimony of defendant's manager was taken by deposition. He testified that he wrote the letter to plaintiffs dated April 15, 1890, and that the defendant did not have the manufacturing capacity to fill the order at that time, and undertook to give additional reasons why the order had not been filled, viz. that the order included a size not contained in the list, and that he was unwilling to give plaintiffs credit to the amount of the order. On cross-examination the witness tes-

tified that they had refused to ship an order given by the Kent Furniture Company of Grand Rapids, dated May 24, 1890, taken by one Dewey; that on the 20th of May, 1890, they cabled Dewey to take no more orders; that he had a brother to whom he wrote, asking him to effect a settlement by which the moneys owing from the Grand Rapids Furniture Company to the defendant, held back by reason of damages claimed for failure to fill orders, might be paid over. The contract with the association is dated June 30, 1890. Therefore, it could have nothing to do with the rejection of these orders. "Question. What is the name of that association referred to in that letter? Answer. I may have referred in my letter to a contract which Mr. Springer had subsequently made, on the 30th of June, 1890, with the German Looking-Glass Company, of New York. Q. For what period of years did the contract referred to in that letter run? A. From June 30, 1890, to December 31, 1892. Q. In that letter, did you not state, in substance, to your brother, that you were satisfied the defendant had made a mistake in going into that contract with the association referred to, and that you and defendant desired now to make such arrangements with the Grand Rapids furniture trade as to be able to regain their patronage when the term of years for which defendant was under contract not to sell to American houses should expire? A. Yes, it may have been said,—something of that kind. I keep no copy of my private letters." These questions were objected to, but the objections were overruled, and we think properly. This was cross-examination, and the testimony tended to show reasons for the failure to fill the order, other than given. The jury were instructed that the testimony was admitted for that purpose only.

A witness who had written a letter in which he had referred to an association was asked to name the association referred to. The question did not necessarily call for the contents of a written instrument.

The testimony called for in the question put to the witness Creque, and excluded, was substantially given by the witness. Evidence admitted without objection tended to prove the assertions made by counsel for plaintiffs in his opening.

The rules laid down dispose of the other questions raised. The judgment is affirmed. The other justices concurred.

WARNER v. TEXAS & P. RY. CO.

(4 C. C. A. 673, 54 Fed. 922.)

Circuit Court of Appeals, Fifth Circuit.
March 13, 1893.

In error to the circuit court of the United States for the Eastern district of Texas.

Action by Charles Warner against the Texas & Pacific Railway Company to recover damages for breach of contract. The court directed a verdict for defendant, and entered judgment thereon. Plaintiff brings error. A motion to dismiss the writ of error was heretofore denied. 2 U. S. App. 647, 4 C. C. A. 670, 54 Fed. 920. Judgment affirmed.

H. Chilton, for plaintiff in error. Wm. Wirt Howe and T. J. Freeman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The plaintiff in error brought this suit against the defendant in error, alleging in his petition that in 1874 he made a contract with the Texas & Pacific Railway Company to the effect that, in consideration of his agreement to grade the ground and furnish the ties for a switch on said company's railroad at a point known as "Warner's Switch," it would furnish the iron, and complete and maintain such switch at that point for his benefit for shipping purposes as long as he needed it; that the switch was constructed in accordance with the contract, and maintained until the 19th day of May, 1887, when, on that day, it was wrongfully, and over the protest of the plaintiff, taken up and destroyed by certain persons, who were then operating the defendant's railway as receivers thereof by appointment of the United States circuit court in and for the Eastern district of Louisiana; that the defendant has ever since neglected and refused to reconstruct and maintain the switch as it contracted and agreed to do; that by reason of the removal of the switch and defendant's refusal to maintain the same the plaintiff has been greatly damaged by the consequent depreciation of his property. The property was specifically described, and consisted of timber lands, timber privileges, sawmills, storehouses, etc., all of which, as alleged, had been acquired, at the time of the removal of the switch, for the purpose of carrying on the business of sawing lumber for market, and which was rendered much less valuable for the want of facilities for transporting his products and supplies.

This suit is for damages for the breach of the defendant's agreement. On the trial below, when the evidence as to the terms of the contract between the parties had been concluded, and on that issue alone, the court held that the contract was not a valid and binding one upon defendant, and instructed

the jury to return a verdict for the defendant. To this action of the court the plaintiff in error excepted. The record in this case presents but a single question for our decision, and that is, "Was the contract between Warner and the railroad company void under the statute of frauds?" Warner agreed to furnish the ties and grade the ground for the switch. This he did within one year. The railroad company agreed to maintain the switch for Warner's benefit, "as long as he needed it." This agreement it has broken. It was a verbal agreement, and upon it this action is founded. If this agreement was "not to be performed within the space of one year from the making thereof," the action cannot be maintained. The agreement is, in its terms as to duration, indefinite and uncertain; but if it is apparent that it was the intention of the parties that it was not to be performed within the space of one year from the time it was made, it would be void under the statute of the state of Texas known as the statute of frauds. Rev. St. art. 2464. That statute means to include any agreement which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making. *Browne, St. Frauds*, §§ 273, 283; *Heflin v. Milton*, 69 Ala. 356; *McPherson v. Cox*, 96 U. S. 416; *Packet Co. v. Sickles*, 5 Wall. 580.

The language used was, to maintain the switch "as long as he (Warner) needed it." What is a fair and reasonable interpretation of this language, in view of all the circumstances? What was the intention and understanding of the parties? To ascertain that we must look at all the circumstances and surroundings that led to the making of the contract. What were they? We find Warner breaking up and abandoning his milling business in other states, and concentrating his business in the state of Texas; after selecting the point at which he desired to locate, he purchased large tracts of timber land for the purpose of carrying on and maintaining his business in Texas; that the point of location was what was afterwards known as "Warner's Switch;" that at the time the agreement was made the representative of the railroad company who was acting for the company in the matter made various inquiries as to the amount of timber accessible to the proposed location, and as to Warner's experience in conducting mills; Warner stating that there was enough timber in sight to run a sawmill for 10 years, and that by moving back some 3 miles from the railroad there would be enough to run a mill for 20 years; and he says that he calculated to stay there as long as he lived. These facts and circumstances, connected with the making of the contract, clearly show that the intention of the parties at the

time was that the switch was to be maintained permanently. They at least show that it was in the contemplation of the parties, and was their understanding, that Warner would need the switch for a much longer period than one year from the time the agreement to maintain it was made, and the proof is that it was in fact maintained for about 13 years. We think it appears affirmatively that the agreement was not to be performed within the space of one year, and that it was void. In a suit for breach of covenants in a void contract there can be no recovery. *Crommelin v. Thiess*, 31 Ala. 412; *Shakespeare v. Alba*, 76 Ala. 356.

But the plaintiff in error contends that the performance by him within one year of his part of the agreement took the contract out of the statute of frauds. The answer to this contention is that part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions, but is only a ground for equitable relief, and cannot be urged as a defense in a suit at law. *Browne*, St. Frauds, § 451; 2 Story, Eq. Jur. §§ 759, 1522, note 3; *Railroad Co. v. McAlpine*, 129 U. S. 395, 9 Sup. Ct. 286. We perceive no error in the ruling of the court below, and the judgment must be affirmed.

BUCK v. HAYNES' ESTATE.

SAME v. PATTERSON.

(42 N. W. 949. 75 Mich. 397.)

Supreme Court of Michigan. June 21, 1889.

Error to circuit court, Clinton county; Smith, Judge.

Federa & Lyon, for appellant. *John G. Patterson* and *H. & H. E. Walbridge*, for appellee.

LONG, J. Claimant purchased an account against Lucy Haynes, deceased, from Dr. George E. Bliss, and filed it in the probate court as a claim against her estate, May 3, 1888. The account, as claimed, amounted to \$97.75, and was for the services of Dr. Bliss as a physician during the sickness of Mrs. Haynes and her husband. The claim was allowed at \$4.50 in probate court, and plaintiff appealed to circuit court, where judgment was entered in his favor for \$5.75. He now brings the case to this court by writ of error. On the trial Dr. Bliss, the assignor of the account, was produced as a witness by the claimant, and testified that he knew Mr. and Mrs. Haynes in their life-time; that Mr. Haynes died May 15, 1885, and Mrs. Haynes died June or July, 1887; that he is a physician, and rendered services as such to Mr. and Mrs. Haynes before their death; that he had an account against Mrs. Haynes for such services, and sold it to Mr. Buck, the claimant, and had now no interest in the claim. Witness further testified that, upon one of his visits to Mr. Haynes, Mrs. Haynes told him: "I want you to attend to him, and do the best you can for him, and I will pay you after harvest,"—and that he attended him until he died, and during that time he furnished medicines to Mrs. Haynes as well as her husband; that on the 18th day of May, after her husband died, he furnished medicines to Mrs. Haynes, when she promised to pay the bills for attendance upon her husband; and that on June 24th and July 15th he furnished her medicines, and she died on the 16th of July. The whole bill amounted to \$97.75, and he had not been paid any part of it. On his cross-examination, the witness was asked the purpose of his assigning the account to Mr. Buck; if it was so he could be a witness to prove the account,—if that was not the purpose of the assignment,—and answered: "I calculated it would leave me free, and I could be a witness, if it was necessary." The court permitted this answer to be given, under objection of counsel for claimant. Error is assigned upon this ruling. All the other assignments of error relate to the charge of the court. The court was not in error in permitting this question to be answered. If the assignment was only made for this purpose, then Dr. Bliss was not a competent witness to testify to the account, even if he was competent to testify under any circumstances to matters which were equally within the knowledge of the deceased. It is

claimed, however, that counsel for the administrator, not having made objection to the competency of the witness on the ground that the matters to which he was testifying were equally within the knowledge of the deceased, therefore this objection was waived, and the witness could not be questioned as to his motive in making the assignment. The very purpose of the inquiry, however, was to show that the assignment was only colorable, and that he still had an interest in the account, and therefore he was incompetent to testify in relation to it. The court very properly received the evidence.

Error is assigned upon the following portions of the charge of the court: "As to the medical services of \$15 up to April 4, 1885, I think that need not be considered by you. I don't think the plaintiff can recover for that item. I don't think the evidence would authorize a recovery for that." Also: "Now, had Dr. Bliss been this claimant here against the estate of Mrs. Haynes, he could not have testified to the conversation between herself and him, because that would have been equally within her knowledge. Inasmuch as she is dead, and cannot testify in relation to the matter, the law would not permit him to testify. Also: "There is some testimony here as to some interest that the doctor has in this case. Now, if from this testimony you think that this assignment is only colorable, and the doctor is the real party in interest, then I think his evidence as to the conversation between himself and Mrs. Haynes ought to be stricken out of this, and ought not to be considered." Error is also assigned upon the remark of the court, in answer to an inquiry from one of the jurors, as follows: "It seems that in the probate court only \$4.50 was allowed, but now, as it stands here, I charge you it should be \$5.75." We see no error in this charge of which the claimant ought to complain. If any error was committed by the court, it was not such as prejudiced the rights of the claimant. The matter was left to the jury to say whether Dr. Bliss had any interest in the claim, and, if they found he had no interest in it, then they might consider his testimony as relating to the whole account, except the \$15, which the court struck out; that being the items of the account for services rendered Mr. Haynes before the time of the claimed arrangement with Mrs. Haynes, that she was to be responsible for the bill for future services. Under the undisputed facts in the case, however, all but the \$5.75 was for services rendered Mr. and Mrs. Haynes before the death of the husband, and the most of it for services to the husband. The claimant claimed to recover under an express contract made with Mrs. Haynes to become responsible for this personally, and seeks to charge it against her estate under this contract. She could be bound by no such contract. At the time it was made, if made at all, she was a married woman. It was not a contract relating to her separate property, and her separate estate

was not to be benefited by it. It was the debt of the husband, and she could not be made liable out of her separate estate by a promise to become surety for its payment, and her promise, if any was made, after her husband's death, to pay it, would not be binding upon her. It was the promise to pay the debt of another person, not made in writing, and wholly without consideration. Under the circumstances here shown from the testimony of the doctor himself, clearly he was not a competent witness to prove such a contract, or to prove the account. This part of the case should have been taken

from the jury. What service he rendered Mrs. Haynes after the death of her husband he could recover for, but he was not a competent witness to prove that part of the account, even. If either party had cause to complain of the ruling of the court, it was the administrator and those interested in the estate, and not the claimant. The judgment of the court below must be affirmed, with costs. We think this appeal is vexatious, and in addition to the taxable costs allowed the administrator will recover against the claimant the sum of \$25. The other justices concurred.

DUPUIS v. INTERIOR CONSTRUCTION & IMPROVEMENT CO.

(50 N. W. 103, 88 Mich. 103.)

Supreme Court of Michigan. Oct. 30, 1891.

Error to circuit court, Wayne county; George Gartner, Judge.

Action by George A. Dupuis against the Interior Construction & Improvement Company on a claim aggregating \$953. Plaintiff recovered judgment for \$150, and now brings error. Affirmed.

Sidney T. Miller, for appellant. Brennan & Donnelly, for appellee.

LONG, J. This action was brought in the Wayne circuit court upon claim made under the following bill of particulars:

To 11½ days' work of dredge Hercules and her crew.....	\$878 00
To changing dipper on dredge.....	75 00

The plaintiff had verdict and judgment in the court below by direction of the court for \$150. He is not satisfied with the amount of judgment, and brings the case to this court by writ of error. The claim made on the part of the plaintiff is that on or about the 29th day of November, 1890, the plaintiff, who was proprietor of a dredge, met one Gibney at the office of the defendant, and learned from him that certain dredging was needed to enable the laying of a natural gas main across the river Rouge, near Detroit. Gibney stated at the time that all there was to be done was the sloping of the banks of the river, (not more than a day's work for the dredge,) which Dupuis agreed to do if paid for the use of the dredge from the time it left its moorings; this agreement being afterwards ratified by a letter from Dupuis, offering to do this work for \$75 a day, and an acceptance by Gibney, also by letter. In pursuance of this agreement, Dupuis sent his dredge on Monday, December 2d, to the place at which the pipe-line was to cross the stream, but found nobody there at first to tell him what to do. So he started to work on what Gibney had told him he wanted done, i. e., the sloping of the banks, and nearly finished it on the same day. On that Monday night Dupuis went to the office of the defendant, and there told Mr. Lambing, one of the officers of the defendant, that he would not go on with the work unless some one came to show him what to do, and Mr. Lambing accordingly promised to send the defendant's engineer the next morning to take charge of the work. The next morning Mr. Lambing himself appeared, and instructed Dupuis to dig a trench along a certain line, which was done. Dupuis at this time told Lambing that the pipes could not be laid on the bottom, as it then lay, as the Rouge was to be dug deeper by the government, and that he could not do the work they required. This he also told three officers of the company whom he met at the company's office, and advised them to get Hiram Walker's dredge, which he

thought would do the work. They answered that they had no time to lose, as the main must be laid to the city within a time specified, and asked him if he could not so change his dredge as to do the work, at the same time telling him he was working for Gibney, who was the contractor. The plaintiff claims at this time that he then said to them that from the wording of the letter he understood he was acting for the company, but was told by Mr. Lambing that he was not, but that he was working for Gibney, the contractor. He said he was sorry for that, and was then asked by Lambing if he understood it now, and he said he did. That Mr. Campbell, another officer of the company, was present, and said to Lambing: "We know Mr. Dupuis, and we can tell him that we will keep enough of Mr. Gibney's money back to pay him for the work he will do dredging." And Mr. Lambing said it is pretty early to do that, when Campbell responded: "We have to do the work; we cannot let it be delayed." That they then asked him to fix a minimum charge for the changes on the dredge, which he did, and signed a paper, agreeing that such changes should not cost more than \$150. That, relying on these promises, he went on and did the work, and now claims the full amount of dredging and change of dredge against the defendant company. The claim is further made by the plaintiff that there was no testimony which warranted the court in limiting the amount to be recovered to \$150, but, on the contrary, that the testimony of the plaintiff shows there was either: (1) A good guaranty for the payment for the full amount due the plaintiff for the dredging, including the work contracted for by Gibney; or (2) a contract between the company and the plaintiff for all of the work, except the sloping of the banks.

The only question involved is whether the promise made by the defendant's officers to pay the plaintiff for the work and labor comes within the statute of frauds. It clearly appears that the original contract was made with Gibney, and there was no misunderstanding upon the part of the plaintiff when he commenced the work as to who was the person liable on the contract. The plaintiff expressly stated to Mr. Lambing, defendant's manager, that he understood the contract was with Gibney, and, after the work was completed, presented his bill to Gibney, and commenced suit against Gibney & Co. for the claim he now seeks to recover against the defendant, making defendant company garnishee defendant in that proceeding. That suit is yet pending. It is evident from the whole record that the plaintiff did not understand that the defendant company ever became liable upon the original promise to pay for the work, and we think the company could not be held liable upon the guaranty claimed to have been made by defendant's officers to pay Gibney's debt. The defendant company was properly held liable by the court below for the cost of making changes in the dredge. The other part of the claim made by

the plaintiff falls directly within the statute of frauds. It appears that the original promisor, Gibney, has not been discharged from liability on the contract; that contract appears yet to be in existence, and uncanceled. In *Baker v. Ingersoll*, 39 Mich. 158, it was held that "a verbal promise to pay for materials furnished to another person on a contract made by him, and not with the promisor, cannot be enforced so long as the original contract remains uncanceled." We think the case falls directly within the ruling of this court in *Welch v. Marvin*, 36 Mich. 59; *Baker v. Ingersoll*, 39 Mich. 158;

Preston v. Zekind, 84 Mich. 641, 48 N. W. 180; *Gray v. Herman* (Wis.) 44 N. W. 248.

Some claim is made by plaintiff's counsel that the court below was in error in admitting in evidence the papers in the suit brought by the plaintiff against Gibney & Co. Those papers were properly admitted in evidence to show that the claim made by the plaintiff was the identical claim made here, and that it was still in existence, uncanceled, and that plaintiff had not discharged Gibney from liability. The judgment must be affirmed, with costs.

The other justices concurred.

MITCHELL v. BECK.

(50 N. W. 305, 88 Mich. 342.)

Supreme Court of Michigan. Nov. 13, 1891.

Error to circuit court, Cheboygan county; J. G. Ramsdell, Judge.

Action by Chauncey E. Mitchell against Alexander R. Beck on an alleged contract by which defendant promised to pay for certain labor. From a judgment for plaintiff, defendant appeals. Affirmed.

McKnight, Humphrey & Grant, for appellant. Bishop & McMahon, for appellee.

CHAMPLIN, C. J. In the spring and early summer of 1889 the plaintiff, who was the owner of a steam-dredge, did some work therewith at the mill-docks of Smith & Daly, at Cheboygan, Mich., and the latter owed him therefor a balance of about \$760. As they did not pay this, he ceased to work for them. On August 12th of the same year he resumed the work on a promise that this balance would be paid at once. They paid him \$300, and promised the balance the following day. On the 13th, and again on the 14th, of August he demanded his pay, and, not receiving it on the latter day, gave his engineer orders to remove the dredge to the mill of D. C. Pelton, refusing to work longer under the contract with Smith & Daly. On the evening of the same day he met the defendant, Beck, at the Grand Central Hotel office, and the contract was made which is the subject of this controversy. It is claimed by the plaintiff that defendant was having a large amount of lumber sawed at his mill under contract with Smith & Daly. Mr. Smith, of the firm of Smith & Daly, had seen both parties during the day, and brought about this interview. Plaintiff's version of his talk at the hotel with Beck is substantially as follows: Beck said he wanted plaintiff to go on and complete the dredging; that it was of as much importance and benefit to him as to Smith & Daly, because he could not get vessels to go there and ship his lumber on account of the shallow water; that if plaintiff would go on and complete the work he would give him his note for the amount as soon as the work was finished; and that any of the banks at Cheboygan would cash the note. This, plaintiff says, he regarded as equivalent to a cash contract, and on the strength of it remained and completed the work. Plaintiff says that Beck agreed to pay for all the work, from and including the 12th of August, and on completing the work plaintiff made out the bill, and presented it to A. R. Beck. Defendant does not admit the conversation as stated by plaintiff, but admits that he had a conversation with him, and says that his agreement was to indorse or accept Smith & Daly's paper for \$500. He says that he expected to hold back money due Smith & Daly for sawing to cover his liability to plaintiff. When the bill was presented to him he mistook the amount for \$1,900, and said he did not think that he had held back that amount,

and when it was explained that the bill was only for \$1,415 he was silent. There is no dispute as to the amount of the bill, or that the work was done and well done. The mill burned the day the dredging was finished. It appears that Beck was an officer and stockholder in the A. R. Beck Lumber Company, a corporation, and the defense to the action rests upon two grounds: First, that the agreement relied upon by the plaintiff is void under the statute of frauds; and, second, that he had no personal interest in the dredging, except as a member of the corporation, and that whatever he said or did was as an agent of the corporation. Proof was introduced in the case tending to support both of these theories.

The plaintiff, under the charge of the court, recovered a judgment. Error is assigned—First, upon certain language used by counsel in his closing address to the jury; second, in the court's not directing a verdict in favor of the defendant after the testimony was closed; and, third, upon the following instructions given by the court to the jury, viz.: "(1) If you find that the defendant Beck did agree to pay the plaintiff for the dredging done at Smith & Daly's mill, from and including August 12, 1889, and that his leading object was not to secure credit for Smith & Daly, but to subserve his own business purposes, and to reap the benefit for himself, real or supposed, and such benefit to himself, or the benefit which he reaped, was the real consideration of his promise, then his undertaking was a valid one, and does not come within the statute of frauds. (2) If you find that Mr. Beck himself was to receive a direct benefit, in exchange for which his promise or undertaking was given, it is wholly immaterial whether Smith & Daly were originally also liable or not. (3) But if you find that the contract was made by this individual, without disclosing his agency, for the benefit of the A. R. Beck Lumber Company, without any reference to the Smith & Daly Lumber Company's interests, then your verdict will be for the plaintiff to the full amount of the labor rendered after the 14th, so that your verdict, if it is for the plaintiff, will be for \$1,198.50. (4) If the defendant is liable at all, he is liable to the full amount of \$1,198.50, and interest from the time the labor was performed up to the present time." We do not think that the language of counsel in closing the case to the jury was such a departure from appropriate argument as to call for a reversal of the judgment. Neither do we see any error in the instructions of the court under the testimony which was introduced before the jury. The case was fairly presented to the jury upon the theory of both parties,—one that it was an original undertaking on the part of Beck, and the other that it was merely a collateral agreement to the undertaking of Smith & Daly. The plaintiff relied upon his own testimony in the case that the undertaking was to pay in full for the work which he did after a certain date. The defendant claimed that

he undertook to become security for the amount of \$500 for Smith & Daly. The court was therefore correct in charging the jury that, if the plaintiff was entitled to recover at all, he was entitled to recover for the full amount claimed, and unless he was entitled to the full amount claimed he was not entitled to anything. This instruction was also correct upon the question of the individual

liability of Beck in entering into the contract without disclosing his agency, although he might have been in fact merely an agent acting for A. R. Beck Lumber Company. We discover no error in the record, and the judgment is affirmed.

GRANT, J., did not sit. The other justices concurred.

STEWART et al. v. JEROME.

(38 N. W. 895, 71 Mich. 201.)

Supreme Court of Michigan. July 11, 1888.

Error to circuit court, Wayne county; Henry N. Brevoort, Judge.

Assumpsit by Daniel Stewart and Andrew T. Stewart, partners, doing business as Daniel Stewart & Son, against George Jerome, upon an oral promise by defendant to pay the debt of one Joseph H. Morris. There was judgment for plaintiffs, and defendant brings error.

H. C. Wisner, for appellant. Larned & Larned (D. A. Straker, of counsel), for appellees.

CHAMPLIN, J. The suit in this case was commenced by declaration which consisted of the common counts in assumpsit. The defendant demanded a bill of particulars, and one was served, which consisted of several items from May 2 to June 5, 1884, of oats, amounting to \$395.66, and a statement that the goods were sold and delivered to Joseph H. Morris for feed for his livery horses at his stables on Michigan Grand avenue, Detroit; that said Morris owed defendant \$10,000, and to secure the same defendant held a chattel mortgage on Morris' horses, harnesses, and other property in said stables, dated June 4, 1884; that said mortgage included no goods or stock of Morris acquired by him after the date thereof, and that Morris purchased and had in his stables stock, goods, and property not covered by said mortgage to the amount of \$4,000; and on or about June 20, 1884, said Morris absconded with intent to defraud his creditors; that said Jerome took possession of all of said horses, coupés, carriages, harnesses, and other property, including stock and property not included in his mortgage, and more than sufficient to satisfy plaintiffs' said demand, which, with the mortgaged property, was liable to attachment; that of the above written account, all being past due and unpaid, \$200 worth of the oats were at the time Morris absconded then in the stables, and not fed out, and were purchased fraudulently, and were replevable by plaintiffs, on the ground that they were obtained by fraud by said Morris, and said plaintiffs intended to proceed to replevin said \$200 worth of oats, and intended to proceed by attachment against the residue of the property taken by defendant to satisfy his mortgage, and not covered by it; and the defendant well knowing all the above premises, and in order to prevent said plaintiffs from enforcing payment of their just debt and lien by attachment and replevin, did promise and agree with said plaintiffs that if they would forbear to enforce their said claims he, said defendant, would assume and pay said debt of said plaintiffs, and, relying on said promises of defendant, did so forbear; and took

no steps to replevin or attach or attempt collection of their debt, and have hitherto forborne until the commencement of this suit, relying on his, defendant's, promise to pay said debt. The defendant pleaded the general issue. Upon the trial of the cause the plaintiffs, against objections made by counsel for defendant that the proof offered was inadmissible under the pleadings, introduced evidence tending to prove the indebtedness of Morris to plaintiffs, the execution of the chattel mortgage by Morris to defendant, the departure of Morris, and the possession taken by defendant of the whole stock and property in the stable, and the promise of the defendant. The plaintiffs are co-partners, composed of Daniel Stewart, the father, and his son, Andrew T. As soon as Daniel Stewart had learned that Morris had left the city, he went to the stables on Michigan Grand avenue, and found defendant's servants in possession, and one of them informed him that defendant wished to see him immediately, and took him in a buggy to the office of defendant, where he had a conversation with defendant as follows: "State what that conversation was fully. Answer. He asked me how much Mr. Morris owed me, and I told him he owed me \$395.66, at the same time handing him the bill. He looked at it a moment, and turned around to me and asked me what I was going to do, and I told him I was going to replevin my oats and attach other property to get my money; that I could not afford to lose it. Question. Now, at that time, what was the fact of your intending to attach any particular property in the stable that he had recently been purchasing? A. Mr. Morris offered me, a few days before he left, a span of large bay mares, and offered me them cheap, tried to persuade me very much to buy them, and also a two-seated wagon that Morris told me was not included and Jerome had no business with. Q. Then you intended to attach what? These horses and the wagon, you say, and the open account? A. Yes, sir. Q. Now, Mr. Jerome asked you what you were going to do, and you told him you were going to replevin your oats, and attach some other property, and get your debt. What did he say to you? A. Be quiet, do nothing, and I will pay you; that is it exactly. Q. What else did he say? A. That my bill was similar to a supply man on a railroad,—when the railroad broke down the supply man had to be paid whoever was paid, and he would pay me. Q. What did you say to that? A. Well, I agreed to it." He further testified that he did not replevin or attach because he relied upon Mr. Jerome paying him, and was satisfied he would. That he reported to his son the interview with Mr. Jerome, and he was not satisfied with it; and they both went the second day after to see Mr. Jerome, when nearly the same conversation was had as before, Mr. Jerome agreeing to pay them if they "stood quiet," and would wait six months, to

which plaintiffs agreed, at the end of which time they called upon him, when he offered \$200 in cash to settle the bill, or, if they would wait 10 months, he would pay the whole face of it. The plaintiffs then agreed to wait 10 months, and directed an entry to be made on their books so they would know when the 10 months was up. At the end of this time plaintiffs again called upon defendant for payment, and he was not yet ready; "complained that he had sold his business to Edmunds, but got very little or no money, and he was scarce of money." Later they called again, and the plaintiff Daniel Stewart testified to the conversation that then occurred as follows: "My son went to him and asked him what was the reason he would not pay us. Why didn't you let us replevin, and attach at once, and get our money? Jerome got a little wrathful, and he said that unless he was willing to pay the bill we could not get it any more than we could get the paint off the wall." The defendant introduced no testimony, and the plaintiffs recovered.

The defense to the action is placed upon two grounds: First, That the promise of defendant is void under the statute which enacts that every special promise to answer for the debt, default, or misdoings of another person shall be void unless some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized. Second, If not void, no recovery can be had upon such promise under the common counts in assumpsit. This clause of the statute of frauds has often come before this court for consideration. In *Corkins v. Collins*, 16 Mich. 478, the plaintiff sued Collins on a verbal promise to pay a board bill and money lent, due from one James Sykes. The consideration was the release of certain trunks supposed to be held for the debt. The defense was the statute of frauds. Mr. Justice Campbell said: "Such a release of a valid claim would be a sufficient consideration for a written promise, for, if a consideration passes from the promisee, it usually makes no difference to whom it passes. * * * It is not pretended that an extension of time, or any other agreement involving no release of property or extinguishment of liability, if made in favor of the principal debtor, would authorize the verbal promise of a third person to pay the debt to be enforced. But a distinction is sought to be drawn where property is released or given up to the debtor. There is no obvious reason for any such distinction. The law puts all valuable considerations on the same footing. * * * When by the release of property from a lien the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on the behalf of the

original debtor; and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing." In *Calkins v. Chandler*, 36 Mich. 329, it was held that an agreement to extend the time of payment and forbear to sue a third person, who was plaintiff's debtor, was a sufficient consideration for defendants' promise to pay. And this was because the promise of defendants to pay the debt of such third person was at the same time, when paid, to apply on an indebtedness that was to accrue against themselves, and was consequently a promise to answer for their own debt. And Mr. Justice Cooley in that case quotes with approval from the opinion of Mr. Justice Shaw in *Nelson v. Boynton*, 3 Mete. (Mass.) 396, as follows: "The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy accruing immediately to himself. But where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." In *Curtis v. Brown*, 5 Cush. 488, Shaw, C. J., said: "It is not sufficient ground to prevent the operation of the statute of frauds that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage had not also directly inured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right, or benefit in question." The doctrine was declared and acted upon in several other cases in that state. *Fish v. Thomas*, 5 Gray, 45; *Jepherson v. Hunt*, 2 Allen, 417; *Furbish v. Goodnow*, 98 Mass. 296; *Ames v. Foster*, 106 Mass. 400; *Wills v. Brown*, 118 Mass. 137; *Fears v. Story*, 131 Mass. 47. The same doctrine is recognized in Wisconsin (*Clapp v. Webb*, 52 Wis. 638, 9 N. W. 796); and in Indiana (*Crawford v. King*, 54 Ind. 10; *Palmer v. Blain*, 55 Ind. 11); and in Vermont (*Whitman v. Bryant*, 49 Vt. 512). In New York the exposition of this section has been somewhat variant, as will be seen by reference to *Leonard v. Vredenburg*, 8 Johns. 29; *Mallory v. Gilbert*, 21 N. Y. 412; *Brown v. Weber*, 38 N. Y. 187; *Ackley v. Parmenter*, 98 N. Y. 425. The latest enunciation of the principles which

should be applied in cases coming under this provision of the statute in that state is by Mr. Justice Finch, in *Rintoul v. White*, 15 N. E. 318, (decided January 17, 1888.) He reviews the leading decisions in New York above cited, and says they "have ended in establishing the doctrine in the courts of this state, which may be stated with approximate accuracy thus: That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." The difficulty in applying the doctrine, and one which has given rise to much seeming conflict in the authorities, lies in the failure to distinguish between the consideration for the promise of a third person to pay the debt of another, and the promise itself, whether it be to answer for the debt of another, or to pay or perform his own obligation. There must be a consideration to support every promise, whether it be evidenced by writing or not; and where the promise is to answer for the debt, default, or misdoing of another, the statute requires that such promise must be evidenced by writing. Under the undisputed testimony there can be no doubt but that in consideration of Mr. Jerome's promise the plaintiffs relinquished an advantage which they had for securing their own debt. The oats and the horses and buggy not covered by Jerome's chattel mortgage were liable to be attached at the suit of the plaintiffs. This is a sufficient consideration for the promise; but the difficulty is that this advantage which the plaintiffs forbore to exercise or appropriate did not inure to the benefit of the defendant. The plaintiffs had no lien which they released. They had no title to any of the property which

they transferred to defendant. It was alleged in the notice attached to the bill of particulars that the plaintiffs owned the oats which they had delivered to defendant because they were obtained by fraud, but there is no evidence which supports such claim. It is true that, by forbearing to attach such oats and other property, it was left in the hands of Jerome, and it may be inferred that he converted such property to his own use, but he derived no right or title thereto from plaintiffs, and is still liable to account to or pay for such property to Mr. Morris, or the true owner, whoever he may be. There was nothing, therefore, which inured to the benefit of defendant, received from the plaintiffs, which supports a new promise or agreement to assume and pay the amount as an original debt from defendant to plaintiffs. There is nothing in the facts or circumstances of this case to distinguish it from that of *Waldo v. Simonson*, 18 Mich. 345, and we think this case is ruled by that. Had the title to the oats in the bin remained in the plaintiffs, and the defendant under his promise had appropriated and fed the oats to his animals, the case would have been different; or had the plaintiffs attached first, and then, in consideration of the promise, released, so that the rights of possession acquired by the attachment passed to defendant, it would have afforded a consideration for the promise to pay the debt as his own within the authorities. The objection to the pleadings stands or falls with the ruling upon the question as to the promise being void under the statute of frauds. If the promise had been held good as an original promise to pay defendant's own debt, the common counts would have been sufficient, and a recovery could have been maintained under the count stated. The judgment must be reversed, and a new trial granted.

The other justices concurred.

**MICHIGAN SLATE CO. v. IRON RANGE
& H. B. R. CO.**

(50 N. W. 646, 101 Mich. 14.)

Supreme Court of Michigan. June 16, 1894.

Error to circuit court, Baraga county; Norman W. Haire, Judge.

Action by Michigan Slate Company against the Iron Range & Huron Bay Railroad Company. To a judgment for plaintiff, defendant brings error. Affirmed.

Wells, Angell, Boynton & McMillan (Ashley Pond, of counsel), for appellant. Philip T. Van Zile and Frank E. Robson, for appellee.

LONG, J. This action was commenced by attachment to recover against the defendant company the value of certain merchandise. Plaintiff claims under a written guaranty, signed by Milo Davis, chief engineer of the railroad company, as follows: "Iron Range & Huron Bay R. R. Co. Milo Davis, Chief Engineer and Superintendent of Construction, Avon, Mich., May 23, 1891. Michigan Slate Company, Avon, Mich.—Gentlemen: Please deliver to Wallace Dingman such supplies as he may order for the construction of the I. R. & H. B. R. R., until further notice, and the same will either be taken out of his estimates from month to month, or taken from his final estimates, or, in case of his failure to complete the job, from last estimate given him, as the case may be, if not otherwise paid; and the Michigan Slate Company is hereby guarantied against any loss from said Dingman's failure to pay for any goods, tolls, and supplies of all descriptions furnished from this date. Milo Davis, Chief Engineer." Claim is also made upon the common counts in assumpsit for goods sold and delivered. A bill of particulars was filed, showing a claim of indebtedness of upwards of \$36,000. The plea was the general issue, and there was also filed and served an affidavit of C. H. Buhl, president of the defendant company, to the effect that the railroad company never executed or caused to be executed the written agreement counted upon in the plaintiff's declaration, and that Milo Davis, chief engineer, mentioned in the declaration, had no authority to execute any such promise or agreement in behalf of the defendant company. It appears that on June 30, 1890, articles of association of the defendant company were filed in the office of the secretary of state. The purpose of the incorporation, as stated in the articles of association, was the construction of a railroad from some point on Huron bay, Baraga county, Mich., through the counties of Baraga and Marquette, to the towns of Champion, Republic, and Michigamme. On July 26, 1890, a contract was made between James M. Turner and the defendant company, by which Turner agreed to undertake forthwith, and to complete within one year from the date of the contract, so much of the railroad

as lay between some eligible point on Huron bay, Baraga county, and the village of Champion, Marquette county, together with all necessary ore docks, stations, buildings, etc. On July 27, 1890, an agreement was signed between Christian H. Buhl and Henry Stephens, of Detroit, and James M. Turner, of Lansing, the substance of which was that, while the said Turner was to take the contract for the construction of the road in his own name, yet he was to act as much for and in behalf of the interest of said Buhl and Stephens as for the interest of himself; and the contract then sets forth the relative rights and obligations of Buhl, Stephens, and Turner under it. August 16, 1890, a contract was made between Wallace Dingman, of Battle Creek, Mich., and said James M. Turner, by which the said Dingman agreed to do all the grading, clearing, grubbing, etc., on said railroad, and to complete the same on or before August 1, 1891. Prior to the time of the organization of the company, Milo Davis, a civil engineer, had been sent by Mr. Turner to make a preliminary survey of the route which the contemplated railroad was to follow. After the organization of the defendant company, on recommendation of Mr. Turner, an arrangement was made with said Davis by which he was to act as chief engineer of the company. It was also arranged that Mr. Charles M. Turner, who was the superintendent of the plaintiff company, should act as the auditor of the defendant company. James M. Turner was the president and treasurer of the Michigan Slate Company, and largely interested in it pecuniarily. The claim of the plaintiff company is that it is entitled to recover against the defendant company for so much of the goods described in the bill of particulars as were furnished prior to May 23, 1891, or up to the time the written guaranty was made, because of certain oral arrangements which it claimed to have made through its superintendent, Charles M. Turner, with Milo Davis, and approved by James M. Turner; and that for the balance of the goods the defendant company is liable by virtue of the written guaranty above set out. The written guaranty, it is conceded, though dated May 23, 1891, was not written and signed until after that date, and, as plaintiff seems to claim, some time in June or July. On the part of the defendant testimony was offered, which, it is claimed, tended to show that neither Turner nor Davis had any authority, either by virtue of the positions held by them or by virtue of any power conferred on them by the railroad company, to buy any goods on the credit of the company to be used by the contractor or subcontractors or boarding-house keepers, or to make any promises for the payment therefor; and that, if such purchases or such promises were made, they were made without the knowledge or consent or ratification of the company; that Milo Davis never had any

authority to make the written agreement declared upon, and that the company had no knowledge that such agreement had ever been made.

The main features of the case relative to the organization of the defendant company, its contract with James M. Turner to construct its road, as well as the contract between Turner and Wallace Dingman, together with the appointment of Milo Davis as chief engineer of the defendant company and his powers and duties, are set out in the case of *Hirschmann v. Railroad Co.*, 97 Mich. 384, 56 N. W. 842, and will not be repeated here. It was said in that case that "the testimony brings the case within any one of the several well-established rules:"

(1) "If the company relinquished to Turner the matter of the construction of this road, and Turner knew that Davis was contracting these obligations in the name and upon the credit of the company, Turner must be deemed to have adopted them. His knowledge was the company's knowledge, and the company is liable." (2) "If the officers of the company were advised that Davis had incurred the June indebtedness to plaintiffs in the name and upon the credit of the company, and with that knowledge did not protest, but, on the contrary, corresponded directly with the plaintiffs, and paid that account, plaintiffs were justified in relying upon that action as an assurance of Davis' authority, and extending further credit, and defendant is estopped from denying the authority of Davis." (3) "If Davis, in the exercise of the authority given to him by the contract in view of Dingman's inability, was prosecuting the work for and on behalf of the company, and incurred this indebtedness in such prosecution of the work, the plaintiffs are entitled to recover." (4) "If Davis was entering into contracts for the work upon the road, employing men, and purchasing supplies in the name of the company and upon its credit, and the officers of the company knew of the fact, or had been advised of instances of like conduct, and remained silent, the company cannot now be heard to say that such person so acting was without authority." It is therefore to be seen whether this case falls within any of the above-mentioned principles.

Some time in August, 1890, Mr. C. M. Turner, as he testifies, commenced selling goods for the plaintiff to Wallace Dingman. Some of these goods were paid for by Dingman, and some by Davis, for the defendant company. The account was balanced, Mr. Turner says, about March 1, 1891, all but \$100, which was carried over to the March account. In that month Mr. Davis came to Avon, and asked him why he did not sell the goods that were wanted at the camps; that a large amount was wanted. Mr. Turner told him that Dingman was in bad shape pecuniarily for so large an amount, when Davis said: "Once you get the busi-

ness, you get orders for the goods, and I will guaranty that you get your pay. I will see that you get your pay for the goods." Mr. Turner says that on the strength of this guaranty he obtained the orders from Dingman, and furnished the goods. He further testified that he called the attention of James M. Turner to the matter, who told him to go ahead, and furnish the supplies. Mr. Turner says that thereafter he ordered a large amount of goods from merchants with whom he dealt, and commenced at once to supply the defendant's camps with them. He continued to do so until June 17, 1891, when he looked over the account with Davis, and settled with him for the goods so furnished to that date, and took from him a time check, showing that there was a balance due the plaintiff of the sum of \$9,830.78. The account was made out to the defendant company, Wallace Dingman, contractor, and indorsed "Approved" by Milo Davis, chief engineer of the defendant company. Prior to this, and about the 1st of May, C. M. Turner had called upon Davis for money. There was then due the plaintiff about \$10,000, and he procured an order for that amount of money, as follows: "Avon, Mich., May 15, 1891. Iron Range & Huron Bay R. R. Co.: Please pay Michigan Slate Company the sum of ten thousand and twenty-nine and ninety-four hundredths dollars, the balance of the amount due on account, and charge same to me. Wallace Dingman, by Geo. L. Davis. [Signed] Milo Davis, Chief Engineer." With this order Mr. Turner was given a letter to Mr. Pierce, chief accountant of the defendant company as follows: "Avon, Mich., May 15, 1891. D. R. Pierce, Chief Accountant I. R. & H. B. R. R. Co., Detroit, Mich.—Dear Sir: The Michigan Slate Company is in such shape that they must have the amount of their bill against W. Dingman. We have barely enough money to pay the rolls, and the only way I could see to help them out was to sign an order on the railroad company for the amount of their bill. Yours, truly, Milo Davis, Chief Engineer." Mr. Turner says that at this time James M. Turner had failed in business, and the Michigan Slate Company was in need of the money. He took the order and letter, and came to Detroit to see Mr. Buhl. He testifies that Mr. Buhl told him at that time that they had made up the monthly account of estimates, and had no money on hand for that matter, and could not pay it. He says further that he thinks Mr. Buhl directed him to file it with Mr. Pierce, but that Pierce objected to it, because at that time it was not signed by Mr. Dingman; that he took it home, and Dingman's signature and O. K. was procured, and he then sent it to Pierce. Mr. Turner further says that he saw Davis, who assured him that if he continued to sell goods he would get his pay, and that Davis soon after agreed to guaranty the slate com-

pany for all loss arising from sales of goods to Dingman, and that Davis afterwards put it in writing. He continued to sell goods under the written guaranty until the balance of the bill was made. The defendant's contention is that neither Mr. James M. Turner nor Mr. Davis had authority to bind the defendant company. The relation of Mr. James M. Turner to the company was peculiar. He was the originator of the scheme for the building of the road. The contract between Buhl, Stephens, and Turner is fully set out in *Hirschmann v. Railroad Co.*, supra. The contract provides substantially that the parties associated for the purpose of "constructing, owning, and operating" the road, and it was to be sold as an entirety within three years after completion. Turner was to take all the stock and bonds for building it; to give his note for one-third of the cost, Buhl and Stephens furnishing the entire money for construction; Turner's one-third of the stock and bonds to remain in the hands of Buhl and Stephens as security; the notes to be carried until the road was sold. It is evident that under this contract the three parties, Buhl, Stephens, and Turner, regarded themselves as the sole owners of the road, and of all the rights and interests therein, and when it was sold they were to divide the proceeds equally between themselves. Mr. James F. Joy had originally entered into the scheme of building the road, but Mr. Turner says he dropped out, and it was understood that the money he put in should remain in the pool, and they would make some arrangement that would be satisfactory to him about it. It appears that Mr. Joy never had anything to do about the matter after that, but that the three parties went forward with the scheme as though they were the sole owners. Mr. Turner did not sign the articles of association, and he claims he was left out so that he could take the contract for the stock and bonds. These three then became the sole managers of the defendant company. They consulted no one else about the management of the affairs of the company, according to James M. Turner's testimony. They appointed Milo Davis as chief engineer, and he was directed by them to advertise for bids, and the contract for the actual construction was let to Dingman. This contract was signed by Turner. Shortly after it was executed, Davis went to the Upper Peninsula, and the work of construction commenced. On November 15, 1890, the Dingman contract was modified, Buhl and Stephens alone making the agreement of modification, and afterwards Turner approved it. No one else connected with the company appears to have been consulted, and the work was thereafter carried forward up to September, 1891. The moneys to carry on the work were sent by the company to Dingman up to some time in January, 1891, and after that time to C. M. Turner or Milo Davis, or paid out by checks

directly from Mr. Pierce, the accountant at Detroit. Mr. Davis had sole charge of the work, except as James M. Turner went up from time to time to look after it. Mr. Davis had his instructions from Mr. Turner. The railroad office and Dingman's office were in the same building, and for the greater portion of the time covered by the accounts Mr. Clark acted as bookkeeper for both parties. Goods were furnished by various parties upon orders made by Dingman, per Clark. Other goods by various parties were furnished under the direction of Davis, who had arranged that certain parties were to have goods when needed. The goods were entered upon the books separately against each camp, and at the end of the month the separate accounts were posted to Dingman's account. Other parties besides the plaintiff delivered goods and posted their books in the same way. At the end of each month the requisitions were made for the amounts needed to pay the various accounts, and sent along with the monthly estimates and paid. Payments were made in this way until about May 1, 1891, when Mr. Davis gave Mr. C. M. Turner, for plaintiff, the order for the \$10,000.

By the terms of the Dingman contract, the defendant company had the right at any time, if Dingman neglected or refused to prosecute the work with a sufficient force to complete it within the agreed time, to take possession and complete it. It is also contended by plaintiff that in the fall of 1890, and before the goods in question were furnished, the defendant company, through Davis, discovered that Dingman was not competent to carry on the work and finish the contract, and so, availing themselves of the foregoing clause in the contract, the company took charge of the work, and finally took it fully out of Dingman's hands, and prosecuted it by Davis, though it was nominally carried on in Dingman's name. There are many circumstances which have a strong tendency to support that claim, though some of the letters and statements of James M. Turner are quite contradictory of that theory. However this may be, it is apparent that the matter was left to James M. Turner to manage, and that Davis, acting under Mr. Turner's direction, went forward with the work, or at least directed and controlled it; and that the goods for which suit is brought were furnished by C. M. Turner for the plaintiff, on the strength of Davis' promise that they should be paid for. Testimony was given by other parties who furnished goods, showing that Davis ordered such goods for the company; also testimony showing that some time in April, and from that time forward, Davis hired men for the work, and gave them time checks, which were paid by the company. It also appeared that Davis, in the course of his correspondence with James M. Turner and with Mr. Buhl and others, generally used letter paper which contained the

heading of the defendant company, "Milo Davis, Chief Engineer and Superintendent of Construction," and that Davis said from time to time that Dingman was unable to prosecute the work, and the company was completing it. It appeared in this case, as in *Hirschmann v. Railroad Co.*, supra, that the June bills, while aggregating a large amount,—over \$50,000,—contained an amount going to Dingman of only \$250, and in the July accounts the amount was nearly \$50,000, and to Dingman only \$250. How the matter of the construction of the road was regarded by the parties is illustrated by the letters passing between them at the time. In a letter from Mr. Stephens to James M. Turner, dated August 5, 1890, he says: "If possible, I would like this letting of the contract to you wiped out of the organization, and the contract between us three to read as we have talked, viz.: Mr. Buhl and myself furnishing the money, if necessary, up to \$500,000. We each own one-third, for which you give your notes from time to time, secured by your one third of the stock and bonds. That's all there is to it, and I am ignorant of the necessity of dragging in and lumbering up an agreement with a contract to you for construction of the road." Mr. Turner, in his testimony, says: "Mr. Buhl, Mr. Stephens, and myself are the company; but it was thought, as the contract ran to me, that I better not appear as a stockholder, in order to have it legal." We have seen that Mr. Davis held himself out as the agent of the company to various parties from whom goods were purchased, and to men whom he employed for the company, and that the affairs of the company were largely conducted by him, or under his direction, from the spring of 1891 forward. James M. Turner was the active party for Buhl, Stephens, and Turner. The whole affairs of the company were in their hands. Mr. Turner, while so acting, gave direction to Davis. Mr. Turner says: "I was to look after the building of the road, and employ the men, and see to it. After Mr. Davis came up, I gave him most of his orders direct from my office as between us three." He says further: "Davis' duties were to see that the men and teams were fed, and it was impossible to feed them without some one being responsible for it." He also says that he said to C. M. Turner, if he would make the arrangement with Davis, and turn in the bills at the end of each month, so as to be checked up and charged to the various persons, that the company would pay for all the supplies that he would furnish. James M. Turner also testified that when the June estimates were presented Mr. Buhl, Mr. Stephens, Dingman, and himself met in Detroit, and looked them over. That Dingman knew but little about them. Milo Davis was there, and wanted about \$50,000, aside from the pay rolls, for mercantile accounts and accounts at two banks. The accounts were all looked over and sealed down

as much as possible, but some were to be paid by the company that month, and were paid. Mr. Johnson, a witness for plaintiff, testified that Mr. Buhl on one occasion told him in Detroit that Milo Davis "is our agent up there." This testimony, and the claims of plaintiff, are contradicted by Mr. Buhl, Mr. Stephens, and others; but the testimony and claims of the plaintiff were proper for the consideration of the jury in determining the question raised. The court, upon this testimony, and the claims made by the plaintiff, directed the jury substantially that if they found that Davis was the agent of the defendant company with power to pledge the credit of the company to pay for goods of the kind in question furnished along the line of the road, and that he did in behalf of the company verbally agree that the company should pay for them, and plaintiff furnished the goods in conformity to the agreement, relying upon that agreement, and looking solely to the defendant for the price, and not to Mr. Dingman, they should find for the plaintiff for the value of the goods furnished before the time the written guaranty was made. But, if the plaintiff looked both to the company and to Dingman for such goods, they must find for the defendant, as, in order to recover, they must find that plaintiff looked only to the company, and not to Dingman at all. As to the goods sold under the written guaranty, the court instructed the jury that if they found that Davis was authorized to make the guaranty in behalf of the company, it would bind the company; and, if they found that Dingman failed to pay for the goods so furnished, the defendant would be liable for their value.

It is contended by defendant:

First. That the admission of testimony showing that Buhl and Stephens were the heavy subscribers to the stock of the company was error prejudicial to the rights of the defendant company, as its tendency was to impress the jury that Buhl and Stephens were the railroad company. It is true that the introduction in evidence of the contracts between Buhl, Stephens, and Turner and the testimony in relation thereto may have had that tendency, and the jury may have been impressed with the idea that these parties were the company; but the evidence was competent for the purpose of showing the authority of Turner in the premises. Counsel for defendant very aptly states the questions here involved as follows: "Had Turner, by virtue of his relations with Buhl and Stephens, or by virtue of any instruction from them, power to guaranty payment to the plaintiff for the supplies in question; or had he the power, by virtue of that relation or those instructions, to authorize Milo Davis to make such a guaranty; or had Milo Davis, because of the fact that he was chief engineer of the road, or because of any authority from the company, power to make such a guaranty?" The court below

directed the jury that the fact of Davis being chief engineer did not of itself imply such authority, so that question is not involved here. It is evident from the manner in which the whole business of the construction of the road was conducted that substantially Buhl, Stephens, and Turner were the company, and their acts are binding upon the company itself. The company cannot adopt the acts that are advantageous to it and reject those which are disadvantageous to the corporation. It is true that there was no formal corporate action, except the making of the contract for the construction; but by this contract Turner was to have all the stock and bonds of the company, and he made it in the interest of Buhl, Stephens, and himself, and with the understanding that the road, as soon as constructed, was to be sold out for the benefit of the three. Much greater power was vested in Turner than was found to be vested in Smith by the *Smith Middlings Purifier Company in Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 84 Mich. 375, 47 N. W. 502, and there it was said: "In conceding that the president must exercise his power of management in subordination to the board, yet when, as in this case, the stockholders, being the owners, have seen fit to vest extraordinary powers of management in the president, and certain other powers in the treasurer and superintendent, and the directors, with full knowledge of this, elect a man to fill all these offices, and thereafter put no restraint upon his management, the board must be held to have consented to his exercising all the powers reasonably included in the language by which it was conferred. * * * What the owners consent to expressly or permissibly they ought not to be allowed afterwards to deny." It is substantially shown that all parties connected with this enterprise agreed that the whole business should be done by and through Buhl, Stephens, and Turner; and it was so done. No one else had any voice in it, or took any part in it. No one else seems to have put a dollar of money in to carry out the contracts. Buhl and Stephens furnished it all, except what Mr. Joy put in originally, and that appears to have been arranged for. Buhl and Stephens then empowered Turner to act for the three, and he did so act, and his acts must be held binding upon the defendant company. This is supported by abundant authority: *Steel Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524; *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, supra; *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 159; *Orr Water-Ditch Co. v. Reno Water Co.*, 19 Nev. 60, 6 Pac. 72; *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198; *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 24 N. E. 834. The first proposition, therefore, that was laid down in *Hirschmann v. Railroad Co.*, supra, finds support here. Turner knew

that Davis had arranged for the goods with plaintiff, and ratified and confirmed the action of Davis.

Second. It is contended, however, that Turner being president of the plaintiff company, and his powers being limited in the contract, which provides that "no indebtedness shall be incurred and no expenditures made without the full consent and co-operation of all the parties to this agreement," Turner's knowledge of this limitation was the knowledge of plaintiff, and therefore plaintiff is estopped from recovery. There can be no doubt that Turner could legally act both for the defendant company—for Buhl, Stephens, and himself—and at the same time for the plaintiff company. A party may act in the double relation of agent for both parties. *Mining Co. v. Senter*, 26 Mich. 75; *Colwell v. Iron Co.*, 36 Mich. 51; *U. S. Rolling Stock Co. v. Atlantic & G. W. Railroad Co.*, 34 Ohio St. 450; *Mayor, etc., v. Inman*, 57 Ga. 370; *Alexander v. Williams*, 14 Mo. App. 27; *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38, 10 S. W. 865; *Kitchen v. Railway Co.*, 69 Mo. 224; *Fitzsimmons v. Express Co.*, 40 Ga. 330. There is nothing appearing in the case to show that Mr. C. M. Turner, who was the general manager of the plaintiff company, did not act in the utmost good faith in making the sales of the goods; and it is apparent that the defendant company actually had the benefit of the goods so furnished. The plaintiff company had constructed several miles of the road for the defendant company, and James M. Turner acted for both parties. The plaintiff company had furnished ties and lumber, which had been paid for, and the defendant company had placed money due the plaintiff to the credit of James M. Turner for the plaintiff. Some other deals had taken place between the plaintiff and the defendant, in which James M. Turner had acted for both parties, and no objection had been made by the defendant, or its officers, or by Buhl and Stephens, so far as this record shows. It also appears that the limitation of an indebtedness of \$25,000 placed upon Turner's power was not adhered to in all cases, and he was permitted to go on with the building of the road if Dingman failed to carry out his contract. It is not claimed that any undue advantage was taken by the plaintiff company by or through this agency, the claim being that no power was vested in James M. Turner or Davis to authorize the purchase of the goods or guaranty payment thereof. Mr. Turner testified that he was to look after the building of the road, and to employ men to see to it, but that, after Davis came up, he gave him orders. Mr. Buhl says that Turner had authority to see to the building of the road under the contract; and, in addition to this, there is some evidence that Buhl and Stephens held Mr. Davis out as the agent of the company.

Third. It is contended that certain testimony given by plaintiff under defendant's objection was inadmissible, and error is assigned upon the ruling of the court. This testimony was to the effect that Davis made statements as to his agency, and directed supplies to be furnished by different parties, and in general appeared to have authority and control over the matters of the company, making contracts for work, and directing the work to be done, and paying for supplies. It was held in *Hirschmann v. Railroad Co.*, supra, that plaintiff was entitled to show what powers had been assumed by Davis, and the extent to which he had been contracting in the name of the company; and we think the rule was there settled that this testimony was admissible.

Fourth. It is claimed that the evidence does not show that C. M. Turner, as the superintendent of the plaintiff company, in selling the goods for which suit is brought looked solely to the defendant for payment, but, on the other hand, charged the goods to Dingman, and that they were sold on the credit of Dingman, and the plaintiff had no idea of looking to defendant for its pay, except in case Dingman failed to pay the debt, and therefore the claim sued upon is void under the statute of frauds. We think it appears from the testimony of C. M. Turner that he would not sell the goods on the strength of Dingman's credit, and he so stated to Davis before any goods were furnished. They were sold, according to Mr. Turner's statement, solely upon the faith of the promise made by Davis that the defendant company would pay for them. This question was fairly submitted to the jury, and they have found against defendant's contention upon the facts. We think, under the facts of this case, the principle laid down in *Bice v. Building Co.*, 96 Mich. 24, 55 N. W. 382, plainly applicable. In that case the defendant company had the right, under their contract with Wilson & Moore, at any time when the contractors failed to prosecute the work with diligence, to provide materials themselves, and deduct the costs from the

money due on the contract. When the defendant found that the plaintiffs would furnish no more materials to Wilson & Moore, or upon their credit, it agreed to make the payment directly to the plaintiff, and it was held that the case was not within the statute of frauds; citing *Nelson v. Boynton*, 3 Mete. (Mass.) 396, in which it was said: "The object to be accomplished by the defendant company was the immediate acquisition of these materials to put into the building. The purpose was not to benefit Wilson & Moore, or to obtain any forbearance for them, but to benefit the defendant company." So, in the present case, the purpose of this arrangement was to get materials to carry on this work, because Dingman could not purchase goods. This was so, not only with regard to the plaintiff, but with others along the line of the road; and the goods were delivered to the railroad company's camps, and there used. It was to benefit the company, and not to benefit Dingman, or to obtain any forbearance for him. This rule was recognized in *Calkins v. Chandler*, 36 Mich. 320, and it was there said: "But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not." This case was cited with approval in *Perkins v. Hershey*, 77 Mich. 504, 43 N. W. 1021. We think, therefore, the principles found to be established in *Hirschmann v. Railroad Co.*, supra, have been fully established here, and under the findings of the jury the defendant is properly held liable, not only upon the verbal arrangement made by Davis with C. M. Turner for the plaintiff, but also upon the written guaranty of Davis.

Many other errors are assigned upon this record, but we do not think it profitable to discuss them. The main features of the case involve the statement of many facts. The theory of both parties was laid before the jury in a full and fair charge, and the jury have determined the issues in favor of the plaintiff. Judgment must be affirmed. The other justices concurred.

HOBBS v. BRUSH ELECTRIC LIGHT CO.

(42 N. W. 965, 75 Mich. 550.)

Supreme Court of Michigan. June 28, 1889.

Error to circuit court, Wayne county;
REILLY, Judge.

Henry M. Cheever and Montgomery & Jeffries, for appellant. *Marston, Cowles & Jerome*, for appellee.

CHAMPLIN, J. The plaintiff was employed by the defendant to trim its lamps, and, while so employed, fell from a pole to the ground, a distance of 25 feet, and was severely injured. He alleges that the accident was caused by the negligence of the company in not providing a proper guard to sustain him while in the act of cleaning the lamp. This guard was a loop of wire, which was suspended from the top of the lamp frame, and passed around under his arms, and, in performing his work this wire was required to sustain nearly the weight of his body. The defect claimed was that this wire was too light, and lacked the requisite strength. He had been in the employment of the company several months in the capacity of trimmer, and had trimmed this lamp, and knew of the unsafe nature and condition of this guard for a long time. It was his duty, under his employment, when he observed any defects in the appliances or apparatus in use by the company to notify it promptly of such defect. He notified the head trimmer of the unsafe size of this wire guard, and he said he would have it attended to, but it was not done. A few days before the accident he reported it to one of the line men, but nothing was done. After his injury, which occurred on the 2d day of January, he was taken to the hospital, where he stayed until he recovered sufficient to walk out, about the middle of March. He went to work again for the company about the 20th of March, and was employed in the shop for a short time, repairing lamps and cleaning them, when he was set at work again trimming lamps. While he was at the hospital the company continued to pay to his wife the same wages he received while at work. They also paid his hospital bills. The wages and bills so paid amounted to \$162.50. After seven or eight days from his injury he knew that his wages were being paid to his wife. He continued to work until the latter part of August, when he took a day off for recreation. When he appeared the next day at the office the superintendent asked him if he had come to quit. He replied "I am here," and he directed Mr. Welton to pay him off, and he did so. He then went and saw Mr. Leggett, the president of the company, and he advised him to go back and talk with the superintendent. After some talk the superintendent told him to come again on Monday. At this time he told plaintiff if he would sign an agreement to clear the company from all responsibility he would give him steady employment as trim-

mer. He said he paid him his wages while he was sick, and his hospital expenses, and plaintiff told him if he would give him steady work he would sign it. A release of all actions, causes of action, and damages was then prepared by the company, and plaintiff signed it, "because he said he would give me steady employment at the same wages that I had been having, which was fifteen shillings a day." He worked until the 20th of October, and was entitled to receive \$24.38.

It was the practice of the company to inclose the wages due their employes in an envelope, with the amount marked on the outside, and at the time the envelope was delivered the employe was required to sign a receipt for the amount. The envelope given to the plaintiff was marked \$24.38, but on opening it he found it contained \$20.38, and a doctor's bill for four dollars. A dispute thereupon arose whether this bill of expense was included in the amount stated in the release, and the company discharged the plaintiff then and there. The plaintiff then brought this action to recover his damages for his personal injuries.

Upon the trial the facts appeared as stated above. The release, bearing date the 10th day of September, 1888, signed and sealed by the plaintiff, was read in evidence, and the court directed a verdict for the defendant on the ground that there was no testimony showing that the release was obtained by fraud, duress, or surprise. We agree with the circuit court that there is no evidence of fraud, mistake, surprise, or duress by which the release was executed and delivered, nor is there any conflict of evidence as to the consideration. The plaintiff's testimony shows the consideration; and it was a good and sufficient one to support the release. The seal imports a consideration, and is *prima facie* evidence of it; but the validity of the instrument may be attacked for fraud, mistake, surprise, duress, or total want of consideration. The rule created by statute that sealed instruments may be impeached for want of consideration applies with equal force to all sealed instruments between party and party. Now, it is claimed by counsel for the plaintiff that there was a total want of consideration, because the money paid for wages and hospital expenses by the company were entirely voluntary, and created no debt or obligation against the plaintiff which he was in any wise bound to repay, and the promise to furnish steady employment was void by the statute of frauds because not in writing. It will be noticed that the agreement to furnish steady employment did not specify any time during which it should be furnished, and a verbal promise, based upon a good consideration, would be valid for one year at least. Grant that the payment of wages and hospital expenses were, in the first instance, voluntary, and could not have been recovered by action, yet there was a consideration for the release in taking the plaintiff, who had been discharged, back into the employ-

ment of the company at fixed wages and the promise of steady employment. This agreement was legal and binding, and, if the plaintiff was discharged without cause, as he appears upon this record to have been, his remedy is upon the agreement. In order to obtain employment by this company he agreed to and did release his cause of action

for damages, and the company, in consideration of such release, did take him again into its service, and promise him steady employment at the wages previously paid to him. The settlement appears to have been satisfactory to both parties, and nothing is shown to impeach its validity. The judgment is affirmed. The other justices concurred.

HARRIS PHOTOGRAPHIC SUPPLY CO.
v. FISHER.

(45 N. W. 661, 81 Mich. 136.)

Supreme Court of Michigan. June 6, 1890.

Error to circuit court, Wayne county.

Corliss, Andrus & Leete, for appellant.
Charles Flowers, for appellee.

LONG, J. Plaintiff is a corporation organized and existing under the laws of this state, and doing business in Detroit. This action is brought in *assumpsit* to recover the price and value of certain personal property claimed to have been exchanged to defendant for real estate. The contract set out in the declaration is that on July 23, 1888, the plaintiff sold to defendant, and the defendant bought of plaintiff a photographic gallery, including the stock, fixtures, furniture, negatives, and everything connected therewith, and used in connection with the carrying on of the business of photographing in Detroit; and in consideration of such purchase and sale the defendant agreed to transfer to the plaintiff certain real estate situate in Bay City, Mich., of the value of \$1,600; and the plaintiff on the day last aforesaid delivered to the defendant the possession of said gallery, and the fixtures and appurtenances connected therewith, and the defendant took possession of the same; yet the defendant has neglected and refused to transfer the said property so as agreed to be transferred in payment for said photographic gallery, although often requested so to do; whereby the said defendant has become liable to pay to the said plaintiff the sum of \$1,600 and interest, and in consideration of the premises then and there promised the plaintiff to pay it, etc. The common counts are also added. The plea was the general issue, and thereunder defendant gave notice of several matters of defense, and, among others—*First*, that no agreement in writing was entered into between the parties; *second*, that there was no delivery of possession of goods and property, and that the defendant only took the keys of the gallery to make an examination and inventory of the property, and upon such examination and inventory, finding the representations of the plaintiff in reference to such property untrue, defendant returned the keys to the plaintiff; *third*, that no possession or right of possession was ever delivered or secured to the defendant; *fourth*, that defendant never promised or agreed to pay to plaintiff the sum of \$1,600; *fifth*, that the contract for the exchange of lands as alleged in the declaration was void under the provisions of section 6181, How. St., the same not being alleged to have been in writing; *sixth*, that the claimed sale of goods, being for the price of \$50 or more, is void, under the provisions of section 6186, How. St., the purchaser not having accepted or received any of the goods, or given anything in earnest to bind the bargain in part payment, and there being no note or memorandum in writing of the bargain made, signed by either of the parties. The cause was tried in the circuit court before a jury, who found a verdict in

favor of the plaintiff. Defendant brings error.

It appears that, at the commencement of the trial, defendant's counsel objected "to any evidence being received under the declaration, for the reason that it does not allege a sufficient cause of action to enable the plaintiff to recover; that the declaration does not contain an allegation sufficient to take the case out of the statute of frauds; and does not allege that defendant retained possession of the gallery, and converted it to his own use." The objection was overruled, and the cause proceeded to trial. The court very properly overruled this objection. The declaration need not set out that the promise in relation to real estate was in writing, or that there was part delivery of the property, or anything paid in earnest on the purchase of the personalty. This is matter of proof, and may be shown on the trial. The declaration set out a cause of action. *Elting v. Vanderlyn*, 4 Johns. 237; *Dayton v. Williams*, 2 Doug. (Mich.) 31.

The case was submitted to the jury upon the question of delivery to the defendant of the personal property sued for, and they have found the fact in favor of the plaintiff, and we cannot disturb that question, if there was any competent evidence to sustain the finding. Taking the whole evidence introduced by the plaintiff, we are satisfied that there was some evidence upon which the jury could very properly say that the property was aliened to the defendant, and was accepted under the contract. It appears that the defendant owned the building in which the gallery was situate, and rented it to the plaintiff. The business of the gallery was being carried on for the plaintiff by Mr. Friend. He states that the defendant talked with him about exchanging some real estate in Bay City for the gallery, and wanted him to see Mr. Harris, the president of the plaintiff company, and learn if such an exchange could be made; that he told defendant the gallery was worth from \$1,400 to \$1,600, and he would see Mr. Harris about the exchange; that he saw Mr. Harris, and, the parties having afterwards met, the witness, being present, said to Mr. Harris: "Here is Mr. Fisher, and you gentlemen better settle the question about the gallery and the real estate." That Mr. Harris said: "Mr. Fisher, you make out the deed, and we will finish this up at once;" when Mr. Fisher said: "There is another room there somewhere,—the broom-room, they call it,—and I want to go and see what is in there." The witness then says: "They gave me the keys, and we went together, and saw what was in there. I did not know what was in there before, and my estimate did not include that. I left Mr. Fisher there, and went home." Mr. Harris, the president of the plaintiff company, gave his version of the affair, as follows: "Mr. Friend made the remark: 'Now, you two gentlemen settle this business up.' So Mr. Fisher and I stepped to the front part of the store, and talked over the matter for a moment or two, and he agreed to give me a deed of certain property in Bay City, valued at

\$1,675. He was to make his deed the next day, and we were to make a bill of sale. That was the conversation. I had never met Mr. Fisher prior to this in regard to it. Mr. Fisher inquired if there was any other property besides what there was in the gallery. I said that there was one camera box, 20x24, that was in Mr. Friend's gallery temporarily, and there were bromide rooms on Grand River Ave., and he said if he bought it he wanted the bromide rooms transferred to the gallery. I said, 'That's satisfactory;' we would transfer the bromide rooms at our expense, and put all inside the gallery on Woodward avenue. Mr. Fisher said he would give me a deed of this property in Bay City, and we were to give him a bill of sale, and the transaction was closed in this manner. I gave him the keys to go and look at the bromide room. He came back, and said he wanted the stuff in the bromide room sent right over that day. We then went and put everything from the bromide room in the gallery. The key to the gallery was in possession of Mrs. Friend. Mr. Fisher said he wanted the key, and the agreement was, if he bought the gallery, Mrs. Friend was to deliver the key to him. The next day Mr. Fisher came in, and wanted to know how the deed should be made out. He said our institution was a corporated company, and, if the deed was made out to the corporation, it would require the signatures of the wives of all the stockholders, and he would like to know whether it should be made to the corporation or to me. I told him I would let him know in the afternoon. He came in again in the afternoon, and I told him he could make the deed to me personally. I saw him again within a day or two. He came in with the deed all made out, with the exception of the signature, as I understood it at the time, of his son's wife. Instead of the property being in his own name, it was in his son's name. He said he would go out and get the signature, and transfer it to me the next day. I did not see Mr. Fisher again for quite a while. He did not pay any attention to our request for the deed. About four or five weeks after the transaction a gentleman brought me a sealed envelope, and inside was the key. I returned the key to him through the mail. I never saw Mr. Fisher again until in court. Some days after this bargain Mr. Fisher came into the store, and wanted me to get an operator for him. He said he understood Mr. Friend could not work for him, and he wanted an operator to run the gallery for him. I afterwards told Mr. Fisher I had written to an operator, and got a reply that he would be in on Monday."

It appears that this first conversation between the parties took place on July 23, 1888. Mr. Harris also testified that he never gave the bill of sale, and never received any deed. After the key was returned, Mr. Fisher commenced suit against the plaintiff for the collection of the rent of the building. Plaintiff also gave evidence tending to show that the defendant stated to a Mrs. Nellie Goodwill that he had traded some property in Saginaw for the gallery, and that he moved a couch

from the gallery to his own rooms in the same building, and then returned it to the gallery, and asked Mrs. Goodwill not to say anything about it, because he had concluded not to buy the gallery if he could get out of it. Plaintiff also gave evidence tending to show that defendant called upon Mrs. Friend, and got the key to the gallery, and told her he had bought it. Substantially this is the claim of the plaintiff. Defendant insists that the contract was not completed; that he only took the key to examine the property in the gallery, and, having made an examination and procured an inventory to be made by a Mr. Kier, who was familiar with such property, he ascertained the property was only worth \$614.15, and was not of the value of \$1,400 to \$1,600, as represented by Mr. Friend; that, finding upon such examination how little the property was worth, he returned the key, and refused to complete the contract. The court submitted the facts very fairly to the jury upon the respective claims of the parties, as follows: "And it is claimed by Mr. Fisher that he did not accept these goods; that there was no acceptance on his part; that he merely took the key for the purpose of taking an inventory. If that is the fact, that would be an end to the case. If you determine that to be the fact; that there was no acceptance on his part; that he did not enter into possession of them; that he merely received the key for the purpose of taking an inventory,—that would be an end to this case, and your verdict would be for the defendant." It is conceded that the contract for the exchange of the real estate is void, because not in writing. It is also conceded that the contract for the exchange of the goods is void, not being in writing, and the value being above \$50, and no part of the purchase price paid, unless there has been a delivery of the whole or a part of the goods and an acceptance. It is clearly settled that both acceptance and actual receipt are necessary, and the burden of proving them rests upon the person trying to set up the contract. They are both facts, and the circumstances which go to make up acceptance and actual receipt are for the jury. 8 Amer. & Eng. Cyclop. Law, 730. Had the action been brought in this case by the plaintiff to recover the possession of the goods, upon a refusal of the defendant to deliver up the key to the building or the goods, plainly it must have been held, under the finding of the jury, that there was evidence of such delivery over, and acceptance by the defendant, as to pass title absolutely to him. The learned counsel for defendant says, in his brief, that "this was a suit upon an executory verbal contract, not performed on either side." If this was so, then no recovery could have been had. But the claim of plaintiff is that there was part performance; that there was a delivery of goods to the defendant, which he accepted,—and the jury, under a fair submission, have found that to be so. This would take the case out of the statute of frauds. It is true that, under the first arrangement, a bill of sale was to be made to the goods, and a deed of real estate to be executed

and delivered. But the title to the goods would pass without the bill of sale, if there was a sufficient delivery and an acceptance. Counsel seeks to bring the case within the rulings of this court in *Shelley v. Whitman*, 67 Mich. 397, 34 N. W. Rep. 879. In that case, however, there was no pretense of a delivery of any part of the goods, which were of the value of \$200. It

was said in that case that the purchaser never accepted or received any article, and never paid anything, and that the letter, which was the only writing, did not show what the contract was. In the present case there was not only a delivery, but an acceptance. We see no error in the record. The judgment must be affirmed, with costs. The other justices concurred.

HATCH v. McERHEN.

(47 N. W. 214, 83 Mich. 159.)

Supreme Court of Michigan. Nov. 14, 1890.

Error to circuit court, Kent county; William E. Grove, Judge.

Fitzgerald & Barry, for appellant. Fletcher & Wanty, for appellee.

CAMILL, J. This case was commenced in justice court, where the plaintiff filed the following written declaration: "Now comes the said plaintiff, and complains of the said defendant, who has been summoned to answer the plaintiff in a plea of trespass on the case on promises, for that heretofore, to-wit, on the 1st day of April, 1889, the said plaintiff, at the special instance and request of defendant, and as the agent and broker of defendant, purchased for the account of defendant a large quantity of canned goods, to-wit, 200 dozen of tomatoes, and 200 dozen of corn, and caused the said goods to be brought to the city of Grand Rapids, ready to be delivered to said defendant; that, afterwards, and on, to-wit, the day and year last mentioned, plaintiff notified defendant of the receipt of said goods, and requested him to receive them, and take them away. The defendant utterly refused to receive said goods as he had agreed, and has always refused and neglected so to do; that plaintiff, by reason of such neglect and refusal on the part of the defendant, was compelled to and did, on, to-wit, the 1st day of April, 1889, sell the said goods on account of, and for the use of, said defendant, to the best advantage, and for the best prices, he could obtain for the same; that by reason of a declining market, and of the depreciation in value of said goods, plaintiff suffered great loss and damage in the handling and sale of said goods, to-wit, three hundred dollars. Therefore he brings suit. Plaintiff also declares on all the common counts in assumpsit to his damages \$300 or under." The plea was the general issue. Plaintiff recovered a judgment in the justice court, and the defendant appealed to the circuit, where the case was tried before Hon. William E. Grove, the circuit judge, without a jury. On the trial in the circuit court, the plaintiff asked leave, and was allowed, to amend his declaration by striking out of it, in the eighth and ninth lines, the words, "and as the agent and broker of said defendant." The court made a written finding of fact substantially as follows: Plaintiff was a retail grocer, and the defendant a commercial broker, both doing business in Grand Rapids. In 1887, when the plaintiff was placing his order for canned corn and tomatoes, the defendant requested the plaintiff to include in his order 100 cases each of corn and tomatoes for the defendant. This was done, and defendant received the goods, paying the actual cost of them at Grand Rapids, when delivered. When it came time to place orders for these goods in 1888, and on

the 20th of February, 1888, the defendant again requested the plaintiff to include in his order 100 cases each of Red Seal corn at 87½ cents per dozen, and Lowenkamp tomatoes at 92½ cents per dozen, each case containing two dozen cans, the defendant agreeing to receive the goods on delivery, and pay for them at the above prices. The plaintiff complied with this request, and ordered the goods from Thomas, Roberts & Co., of Philadelphia. On the 11th of October, 1888, the plaintiff received from Thomas, Roberts & Co. the tomatoes ordered, including the 100 cases ordered for the defendant, and on the 29th of October, 1888, he received the corn ordered, including the 100 cases for the defendant, of which the defendant had immediate notice. During the summer of 1888, the prices on such goods depreciated, and the plaintiff, at the request of the defendant, negotiated with Thomas, Roberts & Co., and obtained a reduction of prices from those made in the contract to 85 cents per dozen for both corn and tomatoes, and the brand of tomatoes was changed to Red Seal. When the goods arrived, it appeared that the tomatoes were of the kind originally ordered, that is, the Lowenkamp; but it does not appear that any fault was found by the defendant with this change. The defendant requested the plaintiff to deliver the goods to him, but the plaintiff refused, unless the defendant would pay for them, which defendant did not offer to do. The plaintiff, in purchasing the goods from Thomas, Roberts & Co., obtained them on the following terms: "Notes payable 60 days from date of shipment, or one-half cash in 7 days." Defendant refused to receive the goods and pay for them on delivery. It does not appear from the finding whether he offered to take them on the terms on which they were sold to plaintiff or not. The plaintiff paid Thomas, Roberts & Co. for the goods at the contract price. After the refusal of the defendant to accept the goods and pay for them, the plaintiff sold 85 cases at the best prices he could obtain for them, sustaining a loss thereon of \$17. Up to the time of the commencement of this suit, the plaintiff has been unable to dispose of the canned corn. The court finds that the corn was worth, at the time of the commencement of the suit, 57½ cents per dozen, and that the plaintiff's loss sustained on the corn was \$55, that being the difference between the price paid and the market price at the time of the commencement of the suit. By agreement of the parties, defendant was to pay his proportionate share of the freight from Philadelphia to Grand Rapids, which the court found to have been \$20.05. It also appears from the finding that the agreement between the parties was a verbal one, and that no note or memorandum of the bargain was ever made or signed by the defendant, or any person thereunto authorized by him. For these various sums, together with interest from the time when plaintiff paid for the goods to the commencement of suit, the court found the plain-

tiff entitled to a judgment. Exception was taken to this judgment that the facts found did not support it.

It is said—First, that the contract was for the sale of personal property exceeding in value \$50, and that it was therefore void, under the statute of frauds. But we do not think the facts found make a case of bargain and sale, but rather one of agency. Plaintiff did not agree to sell the defendant the goods in question, but his contract was to order for him of Thomas, Roberts & Co. If Thomas, Roberts & Co. had refused to furnish the goods, the plaintiff would have been in no way responsible to the defendant as for goods bargained and sold, even if the agreement between the plaintiff and defendant had been in writing. This was evidently the view taken of the transactions by the circuit judge, and we agree with him.

Second. It is said that, considering the contract to have been one of agency and not of bargain and sale, the defendant was entitled to the goods on the same terms of payment as the plaintiff obtained them from Thomas, Roberts & Co., that is, 60 days. Whether this is correct as a matter of law or not need not be discussed, because it does not appear that the defendant offered to take the goods on such

terms, or that he claimed the right to any such credit. The finding is that, in 1887, the defendant ordered goods, and paid for them on delivery; that, in 1888, defendant asked the plaintiff to order goods for him the same as the year before, which, we think, would include the payment for the goods as before on delivery.

Third. There is nothing in the point that the tomatoes, when received, were of the Lowenkamp variety, as at first ordered, instead of Red Seal, as put into the amended order. The defendant did not put his refusal to take the goods on that ground. It does not appear whether the variety known as "Red Seal" was more or less valuable than the Lowenkamp, except that when the change was made in the order from Lowenkamp to Red Seal the price was reduced from 92½ cents to 85 cents, indicating that the Red Seal may have been of a cheaper variety than the Lowenkamp. If so, the defendant could not complain that he was furnished with a better variety. We think the facts found by the circuit judge support the judgment, and it will be affirmed with costs.

LONG, J., did not sit. The other justices concurred.

SAFFORD et al. v. McDONOUGH.

(120 Mass. 290.)

Supreme Judicial Court of Massachusetts. Suffolk. May 6, 1876.

T. H. Sweetser and B. F. Hayes, for plaintiffs. S. A. B. Abbott, for defendant.

MORTON, J. This is an action of contract to recover the price of a quantity of leather, exceeding fifty dollars in value, alleged to have been sold by the plaintiffs to the defendant. There was no memorandum in writing of the contract, and the purchaser did not give anything in earnest to bind the bargain or in part payment.

It appeared on the trial that the defendant on May 17, 1872, went to the plaintiffs' store and agreed to purchase the leather at the price named, to be paid for by a satisfactory note.

On the thirty-first day of the same month, he again went to the plaintiffs' store, examined the leather, had it weighed, marked with the initials of his name, and piled up by itself, to be taken away by him upon giving a satisfactory note for the price, or the payment of the price in money, but not otherwise. He never complied with the terms of the agreement. The plaintiffs refused to allow him to take the leather from their store without such compliance, claiming a lien upon it for the price due. It remained in their store till November 9, 1872, when it was burnt with the store. Upon this evidence the presiding justice of the superior court ruled that the leather had not been so accepted and received by the defendant as to take the contract out of the statute of frauds, and the plaintiff excepted to such ruling.

It should be kept in mind that the question is not whether, if a valid contract of sale upon the terms above named had been proved, the title in the property would have passed to the defendant, so that it would be at his risk. In such a case, the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price, and could retain possession until its payment. *Haskins v. Warren*, 115 Mass. 514; *Morse v. Sherman*, 106 Mass. 430; *Townsend v. Hargraves*, 118 Mass. 325. But the question is

whether the defendant had accepted and received the goods, so as to take the case out of the statute of frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt, there was no valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this, there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser. *Knight v. Mann*, 118 Mass. 143, and cases cited.

In the case at bar, there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had and asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee. In *Baldey v. Parker*, 2 B. & C. 37, 44, Holroyd, J., says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." *Benjamin on Sales*, (Am. Ed.) 151, and cases cited; *Browne*, St. Fraud, § 317.

It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack v. Robinson*, 1 B. & S. 299, 308; *Castle v. Swarder*, 6 H. & N. 828; *Dodsley v. Varley*, 12 A. & E. 632.

In the case at bar, the vendors refused to permit the vendee to take possession or control of the goods, but claimed and asserted their lien as vendors for the price. We are therefore of opinion that the ruling of the superior court was correct.

Exceptions overruled.

ENDICOTT and LORD, JJ., absent.

BUTLER v. THOMSON et al.

(92 U. S. 412.)

Supreme Court of the United States. Oct.
Term, 1875.

Error to the circuit court of the United States for the Southern district of New York.

Mr. William M. Evarts for the plaintiff in error. Mr. E. H. Owen, contra.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff alleged that on the eleventh day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at prices named, and that the defendants agreed to accept the same, and pay the purchase-money therefor; that the iron arrived in due time, and was tendered to the defendants, who refused to receive and pay for the same; and that the plaintiff afterwards sold the same at a loss of \$6,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial, the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at 12 $\frac{3}{4}$ cents per pound in gold, cash.

The following memorandum of sale was made by the brokers; viz.:—

"New York, July 10, 1867. Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet iron, to arrive at New York, at twelve and three-quarters (12 $\frac{3}{4}$) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67. White & Hazzard, Brokers."

The defendants contend, that, under the statute of frauds of the state of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S. p. 136, § 3) is in these words:—

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The eighth section of the same title provides that "every instrument required by

any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretense that any of the goods were accepted and received, or that any part of the purchase-money was paid. The question arises upon the first branch of the statute, that a memorandum of the contract shall be made in writing, and be subscribed by the parties to be charged thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy; and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase.

As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds, but that it is void upon common-law principles. The evidence required by the statute to avoid frauds and perjuries—to wit, a written agreement—is present. Such as it is, the contract is sufficiently established, and possesses the evidence of its existence required by the statute of frauds.

The contention would be the same if the articles sold had not been of the price named in the statute; to wit, the sum of fifty dollars.

Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another." 2 Kent, 615. Bigelow, C. J., defines it in these words: "Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." *Gardner v. Lane*, 12 Allen, 39, 43. A learned author says, "If any one of the ingredients be wanting, there is no sale." *Atkinson, Sales*, 5. *Benj. Sales*, p. 1, note, and p. 2, says, "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised."

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller, unless there be likewise a purchaser. These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which

a title passes from one, and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the statute of frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In *Thornton v. Kempster*, 5 Taunt. 788, it is said,—

"Contracts may exist, which, by reason of the statute of frauds, could be enforced by one party, although they could not be enforced by the other party. The statute of frauds in that respect throws a difficulty in the way of the evidence. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. II., c. 3, on which this decision is based, that "no contract for the sale of goods, wares, and merchandise, for the price of £10 sterling or upwards, shall be allowed to be good except the buyer," &c., is in legal effect the same as that of the statute of New York already cited. See *Justice v. Lang*, 42 N. Y. 493, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only; here both have signed the paper; and, if a contract is created, it is a mutual one. Both are liable, or neither.

Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that *Butler & Co.* have sold a certain amount of iron to *Thomson & Co.* at a price named, there is included therein a certificate and declaration that *Thomson & Co.* have bought the iron at that price.

In *Newell v. Radford*, L. R. 3 C. P. 52, the memorandum was in these words: "Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders;" signed, "John Williams." It was objected that it was impossible to tell from this memorandum which party was the buyer, and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent, and made the entry in the plaintiff's books. In answer to the objection the court say, "The plaintiff was a baker, who would require the flour, and the defendant a person who was in the habit of selling it;" and the plaintiff recovered. It may be noticed,

also, that the memorandum in that case was so formal as to contain no words either of purchase or sale ("Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders"); but it was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of *Sivewright v. Archibald*, 6 Eng. L. & Eq. 286; s. c. 17 Q. B. 103; *Benj. on Sales*, p. 224, sect. 290. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "500 tons Messrs. Dunlop, Wilson, & Co.'s pig-iron." The bought note was for "500 tons Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer, and the sold note to the seller. He says, "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent, in order that he might be bound thereby; for then it would have been delivered to the seller, not to the buyer, and vice versa as to the sold note."

The argument on which the decision below, of the case we are considering, was based, is that the contract of sale is distinct from the contract of purchase; that to charge the purchaser, the suit should be brought upon the bought note; and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note,—that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer, and the sold note to the seller. The plaintiff here has the signature of both parties, and the counterpart delivered to him, and on which he brings his suit, is, according to Mr. Justice Patteson, the proper one for that purpose,—that is, the sold note.

We do not discover in *Justice v. Lang*, reported in 42 N. Y. 493, and again in 52 N. Y. 323, any thing that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed.

The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto.

Judgment reversed, and cause remanded for a new trial.

SANBORN et al. v. FLAGLER.

(9 Allen, 474.)

Supreme Judicial Court of Massachusetts.
Nov., 1864.

Contract brought by plaintiffs, who were partners under the firm name of Sanborn, Richardson & Co., against John H. Flagler and ——— Holdane, as partners under the firm name of Holdane & Co. The writ was served only upon Flagler. The plaintiffs alleged that the defendants had refused to deliver to them fifty tons of best refined iron, in accordance with a written agreement entered into between them. The defendant set up among other defenses the statute of frauds. One of the plaintiffs was called to the stand, and produced to be offered in evidence a paper, of which the following is a copy as near as can be made:

"Will deliver S. R. & Co. best refined iron 50 tons within 90 days—at 5 ct p lb 4 of cash. Plates to be 10 to 16 inches wide and 9 ft to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. H. F. J. B. R."

The defendant objected that the paper was not a sufficient memorandum in writing of the alleged bargain signed by the party to be charged, and that parol evidence was not admissible so as to make it such a memorandum as could be admitted. The judge ruled that the paper was a sufficient memorandum, and would bind the defendant if he was a member of the firm of Holdane & Co. The witness then testified that the agreement was written by him, and that he and the defendant signed their initials, the defendant writing the initials "J. H. F.," and he the initials "J. B. R.," and that before the defendant left the plaintiffs' office, and before 2 o'clock, he accepted the proposition, and so stated to the defendant verbally. The witness testified that he signed his initials on behalf of the plaintiffs, and that he understood the defendant to sign for the firm of Holdane & Co. This evidence was not denied by the defendant. The judge ruled that said paper, with the explanation given, if Richardson was believed, was a sufficient note or memorandum, and was binding on the defendant if the jury found him to be a partner as alleged. The jury found a verdict for the plaintiffs, and the defendant alleged exceptions.

A. A. Ranney, for plaintiffs. C. T. Russell, for defendant.

BIGELOW, C. J. The note or memorandum on which the plaintiffs rely to maintain their action contains all the requisites essential to constitute a binding contract within the statute of frauds. It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement, on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the

minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be charged to the offer to sell. Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell and an express agreement to sell stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it may always be proved by evidence aliunde.

The objections on which the defendants rely are twofold. The first is that the note or memorandum does not set forth upon its face, in such manner as to be understood by the court, the essential elements of a contract. But this position is not tenable. The nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment, and the time within which the article was to be delivered, are all clearly set forth. But it is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection if well founded. There can be no contract or valid memorandum of a contract which does not shew who are the contracting parties. But there is no such defect in the note or memorandum held by the plaintiffs. The stipulation is explicit to deliver merchandise to S. R. & Co. It certainly needs no argument to demonstrate that an agreement to deliver goods at a fixed price and on specified terms of payment is an agreement to sell. Delivery of goods at a stipulated price constitutes a sale; an agreement for such delivery is a contract of sale. Nor can there be any doubt raised as to the intrinsic import of the memorandum concerning the character or capacity in which the parties are intended to be named. A stipulation to deliver merchandise to a person clearly indicates that he is the purchaser, because in every valid sale of goods delivery must be made by the vendor to the vendee. We can therefore see no ambiguity in the insertion of the name of the purchaser or seller. The case is much stronger in favor of the validity of the memorandum in this respect than that of *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446. There only the names of the parties were inserted, without any word to indicate which was the buyer and which was the seller. It was this uncertainty in the memorandum which formed the main ground of the very able dissenting opinion of Mr. Justice Curtis in that case. So in the leading case of *Bailey v. Ogden*, 3 Johns. 399, there was nothing in the memorandum to shew which of the two parties named agreed to sell the merchandise. But in the case at bar, giving to the paper a reasonable interpretation, as a brief document

drawn up in the haste of business and intended to express in a few words the terms of a bargain, we cannot entertain a doubt that it indicates with sufficient clearness that the plaintiffs were the purchasers, and the defendant the seller of the merchandise, on the terms therein expressed. Indeed we can see no reason why a written agreement by one party to deliver goods to another party does not as clearly shew that the latter is the purchaser and the former the seller as if the agreement had been in express terms by one to sell goods to the other.

The other objection to the memorandum is that the name of the party sought to be charged does not appear on the face of the paper. If by this is meant that the signatures of all the persons who are named as defendants are not affixed to the memorandum, or that it is not signed with the copartnership name under which it is alleged that the persons named as defendants do business, the fact is certainly so. But it is not essential to the validity of the memorandum that it should be so signed. An agent may write his own name, and thereby

bind his principal; and parol evidence is competent to prove that he signed the memorandum in his capacity as agent. On the same principle, a partner may by his individual signature bind the firm, if the contract is within the scope of the business of the firm, which may be shewn by extrinsic evidence. *Soames v. Spencer*, 1 D. & R. 32; *Long, Sales*, 38; *Browne, St. Fraud*, § 367; *Higgins v. Senior*, 8 M. & W. 834; *Williams v. Bacon*, 2 Gray, 387, 393. Besides, in the case at bar, the action is in effect against Flagler alone. He only has been served with process and appears to defend the action. Whether he signed as agent for the firm or in his individual capacity is immaterial. In either aspect he is liable on the contract.

It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evidence is admissible to explain and apply them. *Phillimore v. Barry*, 1 Camp. 513; *Salmon Falls Manuf. Co. v. Goddard*, *ubi supra*; *Barry v. Combe*, 1 Pet. 640. Exceptions overruled.

BAGBY et al. v. WALKER et al. (two cases, Nos. 35, 36).

(27 Atl. 1033, 78 Md. 239.)

Court of Appeals of Maryland. Nov. 16, 1893.

Appeals from superior court of Baltimore city.

Two actions: One by Arthur M. Walker and James R. Myers, trading as Walker & Myers, against Charles T. Bagby and Arthur D. Rivers, trading as Bagby & Rivers; the other by Bagby & Rivers against Walker & Myers. Judgment for Walker & Myers. Bagby & Rivers appeal. Reversed as to first action; affirmed as to second action.

Argued before BRYAN, BRISCOE, ROBERTS, FOWLER, and McSHERRY, JJ.

Pollard & Sappington and William S. Bryan, Jr., for plaintiffs. Thos. Ireland Elliott and R. R. Battee, for defendants.

McSHERRY, J. The only questions involved in the two cases now before us arise on the single exception reserved to the rulings of the superior court of Baltimore on several prayers for instructions to the jury. There were two actions between the same parties, tried at the same time in the court below. In one, Walker & Myers, the appellees here, were plaintiffs, and the appellants were defendants; in the other, Bagby & Rivers, the appellants here, were plaintiffs, and the appellees were defendants. In the first, Walker & Myers sued to recover the balance due upon the contract price of certain lumber sold and delivered by them to Bagby & Rivers, and also to recover the difference between the contract price and the market price of certain other lumber subsequently ordered, but which Bagby & Rivers refused to accept. A judgment was entered in favor of the plaintiffs. In the second case, Bagby & Rivers sued to recover damages for a failure on the part of Walker & Myers to deliver the kind and quality of lumber stipulated for, and also for a failure to deliver within the time designated in the agreement a large part of the lumber sold by them to Bagby & Rivers. A judgment of non pros. was entered in the case. The contract is embodied in a letter from Bagby & Rivers to Walker & Myers under date of January 29, 1891, and a written acceptance of the terms by Walker & Myers on the same date. The time limited for filling the order was three months. The first delivery under this written contract, about the execution of which there is no dispute, was made in the following March, and the last on November 27th of the same year, long after the expiration of the three-months limit. The price of the lumber actually delivered amounted to \$1,635.38, and the payments made thereon, beginning in April and ending in August, aggregated \$1,137.98, leaving an unpaid balance of \$497.70. There

was evidence in the case tending to prove that Bagby & Rivers had waived the requirement of time mentioned in the letter of January 29, 1891, as to the delivery of the lumber. Walker & Myers offered other evidence, tending to prove that in the latter part of November they, at the request and upon a verbal order of Bagby & Rivers, cut and shipped to Baltimore other lumber, in addition to that specified in the contract, at a price agreed upon between them, which lumber they offered to Bagby & Rivers in two lots in January and March, 1892, but that Bagby & Rivers refused to receive it, and that Walker & Myers lost by those refusals \$179.20, that sum being the difference between the price agreed upon and the market price when the deliveries were tendered. Bagby & Rivers denied giving the order for this additional lumber. The lumber was cut by Walker & Myers at their mills in North Carolina for the purpose of filling these two orders, and was transported to Baltimore, where it was unloaded on the wharves of Walker & Myers, from whence all of it, except the two lots which Bagby & Rivers refused to take, was hauled by Bagby & Rivers, after being inspected by them, to their furniture factory. Upon these facts the court instructed the jury at the instance of Walker & Myers that, notwithstanding the mention in the letter of January, 1891, of the period of three months as the limit within which the lumber was to be furnished, still, if the jury should find that Bagby & Rivers waived that requirement, and accepted and hauled lumber from the plaintiffs' wharves until November 27, 1891, then the defendants would not be entitled to recoup against the plaintiffs' claim any damages sustained by the defendants by reason of the failure of the plaintiffs to deliver the lumber within the time stipulated. Further, that if the defendants ordered other lumber, that the plaintiffs cut it upon that order, and offered it to the defendants at the usual place of delivery; that it was of the quality ordered; and that the defendants refused to take it, and pay for it,—then the plaintiffs would be entitled to recover damages for that refusal. This was Walker & Myers' third prayer. And, finally, that under the last preceding instruction the measure of damages would be the difference between the price agreed upon and the market price in Baltimore at the dates when the lumber should have been accepted. Mere acceptance of the lumber after the expiration of the time fixed in the agreement for its delivery was not of itself a waiver of the breach committed by the failure to deliver it according to the terms of the contract; nor did such an acceptance preclude the vendees from subsequently suing to recover the damages resulting to them by reason of the non-delivery from the time of default up to the date of acceptance; nor from recouping, when sued by the vendors, those damages

against the latter's claim for the purchase money. *Central Trust Co. v. Arctic Ice Mach. Manuf'g Co.*, 77 Md. 202, 26 Atl. 493. The instruction does not question these principles. It does not proceed upon the theory that acceptance after a refusal to deliver within the stipulated time is of itself, without more, equivalent to a waiver of the time for delivery, but distinctly leaves to the jury to find from the evidence in the case whether, as an independent fact, Bagby & Rivers waived the requirement that the lumber should be furnished within three months. If they did waive that requirement, they could not subsequently found an action upon its nonperformance, nor rely thereon by way of recoupment. If they condoned the breach, they cannot afterwards base a claim for damages upon it. There was evidence before the jury to the effect that Bagby & Rivers had waived the requirement of time mentioned in the letter of January 29, 1891, and no special exception was taken to the prayer upon the ground that there was no evidence in the cause to support it. It is a mistake to suppose that the prayer is founded upon the assumption that a mere acceptance of the lumber was tantamount to a waiver of the time for delivery, and there is nothing in the structure of the prayer at all calculated to mislead the jury to such a conclusion. There was, in our opinion, no error committed by the granting of it.

The two remaining instructions given at the instance of Walker & Myers relate to the lumber which Bagby & Rivers refused to receive. There were three objections suggested to the first of these two instructions, which is the third prayer of Walker & Myers; and these are: First, that the instruction makes reference to the facts stated in an antecedent prayer, which was rejected, and which was consequently not before the jury; second, that the contract upon which it permits a recovery is void under the seventeenth section of the statute of frauds; and, third, that, no time having been named in the verbal contract for the delivery of lumber under it, a reasonable time was implied by law, and the finding of what was a reasonable time should have been left to the jury. The first objection is not a substantial one. A reference to the facts stated in the rejected prayer was wholly superfluous. Eliminating that reference altogether in no way affected the integrity of the instruction. Its remaining in the instruction could not possibly have misled or confused the jury, and obviously did not prejudice or injure the appellants. The second objection, though more plausible, is not more tenable. While the seventeenth section of the statute of frauds (29 Car. II., c. 3) declares all contracts for the sale of goods, wares, and merchandise for the price of £10 and upwards to be invalid unless part of the goods be accepted, or part of the price be paid, or something be given in earnest to bind the

bargain, or some note or memorandum in writing be signed by the party to be charged, still from a very early period it has been the settled law of Maryland, where the Statute of Charles has always been in force, that when work and labor are to be bestowed by the vendor upon the article sold before it is to be delivered the contract is not within the statute, (*Eichelberger v. McCauley*, 5 Har. & J. 213; *Rentch v. Long*, 27 Md. 188;) and the reason is that when work and labor are necessary to prepare an article for delivery the work and labor to be done by the vendor form part of the consideration of the contract, and, as these are not within the statute, the sale is not a sale of goods, wares, and merchandise, within the meaning of the seventeenth section of 29 Car. II., c. 3. Now, the proof shows that when the alleged verbal order was given, shortly after November 29, 1891, for this additional lumber, it was necessary for Walker & Myers to have the lumber cut or prepared for delivery,—to put it in a condition different from that in which it was at the time the contract was made. This circumstance took the contract out of the operation of the statute. The third objection to the instruction is, though narrow, substantial and fatal. No time was fixed in the alleged verbal contract of November, 1891, for the delivery of the lumber under it. The law in all such instances prescribes a reasonable time, (*Kriete v. Myer*, 61 Md. 558;) and it is for the jury, under all the circumstances of the case, to determine what is a reasonable time, (*Buddle v. Green*, 3 Hurl. & N. 903; *Bryam v. Gordon*, 11 Mich. 531; *Pinney v. Railroad Co.*, 19 Minn. 251, [Gil. 211]; *Stange v. Wilson*, 17 Mich. 342; *Kriete v. Myer*, 61 Md. 558.) But this instruction submitted no such question to the jury. The proof showed that Walker & Myers tendered delivery of this lumber in two lots,—one on January 2d, and the other on March 22, 1892; but whether these were within a reasonable time, under all the circumstances of the case, was not only not left to the jury to determine, but was in effect decided by the court. The instruction assumed that the offers to deliver were made within a reasonable time, for it left to the jury to find that the order for the lumber was given; that the lumber was cut; that it was offered to Bagby & Rivers at the usual place of delivery; that its quality was such as had been specified, and that the defendants refused to accept it; and then instructed them that upon the finding of these facts the plaintiffs were entitled to recover. But the time when the offer to deliver was made, which was a necessary element of the plaintiff's case, was entirely ignored. Whether the offer had been made within a reasonable time or not was exclusively for the jury to say, but it was not submitted to them. The instruction, by directing a verdict for the plaintiffs upon the finding of the facts above stated, necessarily assumed that the offers

to deliver had been made within a reasonable time, because, unless the offers to deliver had been made within a reasonable time, the plaintiffs had no right to recover at all. But it was not within the province of the court to assume or to decide that question, and, as a consequence, the instruction in which that was done was erroneous.

The remaining prayer granted upon the request of Walker & Myers relates to the measure of damages for the refusal of Bagby & Rivers to receive the lumber offered to them in January and March, 1892, and correctly states the law on that subject. *Pinckney v. Dambmann*, 72 Md. 183, 19 Atl. 450. But, inasmuch as this instruction was dependent upon and a mere corollary from the preceding erroneous instruction, though correct as an abstract proposition, there was error in granting it. Had the previous instruction been right, this one would have been properly given.

The superior court rejected the first and fourth prayers presented by Bagby & Rivers, and these prayers raise the only other questions open for review. The fourth prayer was very properly abandoned in the argument, and we need therefore give to it no consideration. The first prayer of Bagby & Rivers asked the court to say to the jury

that if they should find that Bagby & Rivers were induced to receive the lumber by false representations knowingly made by Walker & Myers as to its quality and condition, then Bagby & Rivers would not be bound by any inspection made by them of the lumber. We need only say, in disposing of this prayer, that there is no evidence in the record to show that Walker & Myers knowingly made any false representations as to the quality and condition of the lumber, and that, therefore, it would have been improper to allow the jury to speculate upon that subject, as they must have done had this prayer been granted.

It follows from the views we have expressed that there was no error committed by the court in its rulings in the case of Bagby & Rivers against Walker & Myers, and its judgment of non pros. in that case will be affirmed. It also follows that, as there was error committed in granting the third and fourth prayers presented by Walker & Myers, the judgment in the case of Walker & Myers against Bagby & Rivers must be reversed, and a new trial will be awarded.

Judgment in No. 35 reversed, with costs above and below, and new trial awarded. Judgment in No. 36 affirmed, with costs above and below.

COFFIN et al. v. BRADBURY et al.¹

(35 Pac. 715.)

Supreme Court of Idaho. Jan. 26, 1894.

Appeal from district court, Ada county; Edward Nugent, Judge.

Action by Frank R. Coffin and others against W. C. Bradbury and others to recover the price of goods sold. There was judgment for plaintiffs, and from the order denying a new trial, defendants appeal. Affirmed.

Texas Angel and S. L. Tipton, for appellants. Geo. H. Stewart, W. E. Borah, and Edgar Wilson, for respondents.

SULLIVAN, J. This action was brought to recover the value of five New Era ditchers, alleged to have been sold to, and received and accepted by, appellants, who were defendants in the court below. The answer is a general denial of the allegations of the complaint. The action was tried by the court with a jury, and a verdict rendered in favor of respondents for the sum of \$6,052.91, together with interest, amounting to \$1,659.21, on which verdict judgment was duly entered against appellants. A motion for a new trial was interposed and overruled by the court. This appeal is from the order denying the motion for a new trial, and from the judgment.

Respondents contend that the errors alleged to have occurred on the trial were not properly saved and preserved, so as to authorize this court to consider them on this appeal. Their contention is, that under the provisions of section 4426, Rev. St. 1887, each exception taken on the trial must be settled at the time the decision is made, other than those deemed excepted to by the provisions of section 4427, Rev. St., unless a different time is agreed upon by the parties; that no exceptions were settled during the trial, and no time agreed upon by the parties for their settlement. The record contains a stipulation, in which it is agreed that, at the trial of this case in April, 1892, which resulted in a disagreement of the jury, the following entry was made in the minutes of the court, to wit, "The parties here stipulated that they might prepare a bill of exceptions after trial,"—and upon this stipulation the appellants rely, and contend that it remained in force and effect at the trial that resulted in the judgment from which this appeal was taken; while respondents contend that said stipulation applied to the trial then in progress, and no other, and applied to a settlement of a bill of exceptions, under the provisions of section 4430, Rev. St. 1887, and not to exceptions taken on the trial. This contention was denied by the trial court, and no exception taken thereto, and no appeal has been taken

therefrom. The plaintiff cannot have errors alleged to have been committed against himself reviewed on defendant's appeal. The appeal of either party brings up only the errors alleged to have been committed against himself. If the respondent in an appeal desires to have errors against himself corrected, he must present them to this court on his own appeal. *Jones v. Irrigating Co.*, 2 Idaho, 58, 3 Pac. 1.

The first error specified is the insufficiency of the evidence to justify the verdict. Under this specification of error, the question of the validity of the contract sued on, when tested by the statute of frauds, is raised. It is contended that, as the value of the property sued for is shown to have exceeded \$200, the contract, or some memorandum thereof, must be in writing, and subscribed by the party charged, or by his agent, unless the buyer accepted and received a part of said property, or paid, at the time of the bargain, some part of the purchase price; that, as none of these requirements were complied with, said contract comes within the provisions of section 6009 of the Revised Statutes of 1887. The provisions of said section, claimed to be applicable to this case, are as follows: "In the following cases the agreement is invalid unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged or by his agent. Evidence therefore of the agreement cannot be received without the writing or secondary evidence of its contents: * * * Subd. 4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money." It is sufficient, under this section of the statute, if the chattels, goods, or things in action are delivered to and accepted by the purchaser, at any time after the contract of purchase is made. But, unless the provisions of said section, above quoted, are complied with, the seller could not, at any time after the contract was made, deliver the goods, and compel an acceptance of them. However, if the goods are received, and accepted by the purchaser, the contract is then taken out of the statute of frauds, and may be enforced against the buyer, for the purchase price. It is alleged in the complaint that said ditchers were sold to appellants on the 14th day of March, 1890, and that thereafter they accepted and received the same. It is not claimed, by respondents, that they aver or prove a delivery and acceptance, at the time the contract of sale was entered into, or that the contract, or some note or memorandum thereof, was in writing, signed by appellants, or by their agents, or that any part of the purchase money was paid at the time the contract was entered into. It is the receipt and acceptance of the machines,

¹ Opinion of Morgan, J., omitted.

some 15 days after the contract of purchase was made, that respondents rely upon as taking this contract out of the provisions of said section, and, we think, with reason. If a contract of sale is made, and the property subsequently received and accepted by the purchaser, it is then too late to escape liability thereon, because of the provisions of said section. Had the purchaser refused to receive and accept the property, and suit been brought to enforce the contract, said statute would have been a complete defense to such action, but, after the receipt and acceptance of the property, the virtue of said section, as a defense to an action to recover the purchase price, is gone. This section of the statute of frauds only relates to executory contracts, and not to executed ones. Receipt and acceptance of the property sold, at any time after making the contract, takes the contract out of the statute of frauds. *Hinkle v. Fisher*, (Ind. Sup.) 3 N. E. 624; *King v. Jarman*, 37 Amer. Rep. 11; *Cartan v. David*, 18 Nev. 311, 4 Pac. 61; *Dodge v. Crandall*, 30 N. Y. 294; *Brown v. Trust Co.*, 117 N. Y. 266, 22 N. E. 952.

The second contention is, that said ditchers were not delivered to, or received and accepted by, appellants. The evidence of respondents shows that, at the time said ditchers were ordered, J. M. Bray informed Sherman M. Coffin that a man by the name of Jessop was going to use the ditchers in the construction of a certain ditch, which appellants were constructing under the supervision of J. M. Bray. It also shows that, when the ditching machines arrived at Nampa, Jessop appeared, and assisted in setting them up ready for use; that he took possession of them, and took them out upon the aforesaid ditch, and went to work thereon with them; that, while taking them out on the ditch, he met Mr. Bray; that he used them on said ditch, under the immediate supervision of Mr. Bray, for two months, at least. It was conceded, on the trial, that the ditchers were delivered to Jessop, who was a subcontractor of appellants, and the question of acceptance does not appear to have attained special prominence during the trial of the case. Upon a careful review of the entire evidence, I think it tends to show that the ditchers were purchased for the use of Jessop, and that he received and accepted them, and that his receipt and acceptance was the receipt and acceptance of Bradbury & Bray, and bound them.

The questions of sale and delivery were submitted to the jury, upon an instruction by the court, at the request of appellants, whereby the jury was instructed that, to entitle the plaintiffs to recover, they must establish, by a preponderance of evidence, the sale and delivery of the ditchers to the defendants, and, by their verdict, they found those points in favor of respondents. When, from the entire evidence, different minds might honestly reach a different conclusion,

as to the acceptance of the property sold, the question of acceptance is one of fact, for the jury, and their verdict thereon will not be disturbed. Nor will the order of the court, denying a motion for a new trial, be reversed when the aforesaid conditions exist. See note to *Shindler v. Houston*, 49 Amer. Dec. 316; *Gray v. Davis*, 10 N. Y. 291; *Baker, Sales*, § 392a; *Thielen v. Rath*, (Wis.) 50 N. W. 183; *Galvin v. MacKenzie*, (Or.) 27 Pac. 1039; *Garfield v. Paris*, 96 U. S. 557; *Hinchman v. Lincoln*, 124 U. S. 39, 8 Sup. Ct. 369.

Considerable authority is cited on the question as to what acts constitute an acceptance, under said section 699. The correctness of the rule established by the authorities cited is not questioned. The case of *Shindler v. Houston*, 49 Amer. Dec. 316, is cited as a case in point. It was held, in that case, that delivery and acceptance of goods, such as will take it out of the statute of frauds, cannot be shown by mere words. Some acts transferring possession are necessary. That case is not in point, for the reason that it is not claimed nor shown that the transfer of the possession of said machines was made by mere words, but that the machines were set up and possession of them given; that respondents parted with possession, and thereafter exercised no rights of possession or ownership over them; that the person for whose use they were intended took them, and put them to the very use for which they were purchased. The case of *Hinchman v. Lincoln*, 124 U. S. 39, 8 Sup. Ct. 369, is cited as a case very similar to the one at bar. That is a case where the facts, in relation to the contract of sale, alleged to have been within the statute of frauds, were admitted. There was no dispute as to the facts on which appellant relied, showing, as he claimed, sale, delivery, and acceptance. The court held that, as there was no dispute as to the facts, it belonged to the court to determine their legal effect. It was also held that, to take an alleged contract of sale out of the operation of the statute of frauds, there must be acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, and that, when anything remained to be done by the seller to perfect the delivery, such fact would be, generally, conclusive that there was no receipt by the buyer. This case is very different from the one under consideration. The facts of sale, delivery, and acceptance were in dispute, and nothing is shown which would indicate that anything remained to be done by the seller to perfect the delivery of said machines. It is earnestly contended by appellants, and with apparent confidence, that all of the evidence, taken together, shows that the sale of said ditching machines was made by Stearns to Jessop a day or two before Sherman Coffin met Bray at Nampa. It is claimed that Stearns testified that he

sold said machines to Jessop. Mr. Stearns, as a witness for appellants, on direct examination, did testify that he sold four ditchers to Jessop. He afterwards testified as follows, to wit: "Q. Why did you telephone for Coffin to come up? A. Because I wanted him to sell those ditchers, so that I could make a little money. That is what I did it for." Further on, he testified as follows: "Q. And you assisted Coffin all the way through the negotiations? A. No; I could think I did, all the way. Q. Did you hear anything, or all that was said, on that day, in relation to the sale of those ditchers to Jessop? A. I don't know whether I did or not. The sale was not consummated in my presence. Q. Then the sale was not consummated until Sherman Coffin came up? A. No, sir. It might have been at that time, but I don't remember. Q. And Jessop was in Utah? A. Jessop was in Utah." This evidence needs no comment. It is too plain to be misconstrued, or misunderstood. It clearly shows that no contract or bargain for the sale of the machines was made between Jessop and Stearns, and that, if any bargain was made, it was made between Coffin and Bray, at a time when Jessop was in Utah. Sherman Coffin testified that no sale was made until he met Bray at Nampa, in response to a dispatch from Stearns. He also testified that he never met Jessop until the ditchers arrived at Nampa; that John M. Bray was the man who gave the order for the ditchers, and who agreed to pay for them as a member of the firm of Bradbury & Bray. This was denied by Mr. Bray. He denied that he made any contract for the purchase of said machines, and denied that he had any authority from Jessop to purchase said machines. He testified as follows, to wit: "I says: 'No, sir, Mr. Coffin; I will have nothing to do with those machines, whatever. I have no authority to buy machines for Jessop.' * * *" This evidence shows that Bray did not purchase them for Jessop. Mr. Bray also testified to a conversation, alleged to have been had with Frank R. Coffin, about the middle of May, 1890, in which he stated to Coffin that he had nothing to do with the machines whatever; "that the entire sale of those machines was between Sherman Coffin, Stearns, and Jessop." The testimony of Stearns shows that he had a conversation with Jessop, in regard to ditching machines, in the presence of J. M. Bray, a day or two before Sherman Coffin met Bray; that thereafter Jessop left Nampa for Utah, and Stearns telephoned Coffin to come to Nampa, and, on his arrival, introduced him to J. M. Bray as the man who could talk with him about those ditchers, and the evidence shows that they did talk about ditchers. It may be true, as testified by Mr. Bray, that he then and there informed Sherman Coffin that he would have nothing to do with the machines, whatever, and that he had no authority to purchase machines for

Jessop; but, regardless of those statements, the testimony tends to show he did have some conversation about them, and authorized Sherman Coffin to have them shipped in the name of Bradbury & Bray, and afterwards requested Coffin to not have them shipped in said firm's name. Coffin testified that the contract was made with Bray. Stearns' testimony is to the same effect. Bray testified that it was made between Stearns, Coffin, and Jessop. And from this conflicting evidence, and other evidence, the jury found against appellants. The testimony of Charles Stewart tends to corroborate the testimony of Sherman M. Coffin. He testified as follows: "I rode up to Bray, who was out on the ditch, where Jessop's contract was. I rode up to Bray, and I think he wasn't using very good language towards Jessop, because Jessop was getting behind. He says, 'I am in the soup with Coffin Bros. for those damned ditchers.'" This testimony is not contradicted. D. H. Birdsall, a witness for respondents, testified that he met Bray, at Nampa, between May 27 and 30, 1890, and had some conversation with him about selling him safety nitro powder, and he informed Bray that Coffin Bros. were agents for said powder, and would supply Bray with said powder. Bray thereupon informed Birdsall that he had some difficulty with Coffin Bros., and did not care to deal with them. After some further conversation, Birdsall informed Bray that he was going to Caldwell to see Sherman M. Coffin, and Bray thereupon requested him to say to Coffin that he (Bray) did not wish to have any trouble with him, (Sherman M. Coffin,) and that he would see that they (Coffin Bros.) were paid for the ditchers. This testimony is contradicted by Bray. Birdsall and Stewart were disinterested witnesses, and the jury no doubt gave some weight to their testimony, as corroborating that of Sherman M. Coffin. But it is urged by appellants that, if said statements were made by Bray, they would be perfectly consistent with the theory that Bradbury & Bray were only guarantors, and not purchasers. There might be some point in this contention if J. M. Bray admitted that he was simply guarantor; but he denies that they were guarantors, and there is no evidence tending to show that they were, except that contained in the letter written by Sherman M. Coffin to J. M. Bray, dated May 24, 1890. If the defense in this suit had been, that appellants were guarantors, and not liable because such guaranty was not in writing, then the contention of appellants would be of some weight; but, as that is denied, and the issue was as to whether the appellants were original purchasers, the evidence of Stewart and Birdsall tends to corroborate the testimony of respondents on that issue. The issue as to whether Bradbury & Bray were simply guarantors is not in this case. It would appear that said statements were made by Bray to Stewart

and Birdsell, not upon the theory that Bradbury & Bray were guarantors, but upon the theory that they were purchasers. C. W. Moore's testimony also corroborates Sherman M. Coffin, as to the sale. He testified that he had no knowledge of the sale of any goods at the time a certain telegram was sent, except the ditchers to Bradbury & Bray. By what means the witness became possessed of that knowledge, the record fails to disclose. The testimony of Sherman M. Coffin and Mr. Bray is so unsatisfactory, and conflicting in substantial matters, that it is impossible for this court to say how much of said testimony is true, and how much is false, and, as the jury are the exclusive judges of the weight to be given to the testimony of any witness or witnesses, and they having found on the purchase, delivery, and acceptance of the machines, this court, under the conditions, would not be justified in disturbing the verdict.

Appellants contend that the court erred in permitting Sherman M. Coffin and Frank R. Coffin to testify in regard to a certain telephone message, sent by the former to the latter, inquiring as to the responsibility of appellants. The evidence shows that, on the day the ditchers in controversy were ordered, Sherman M. Coffin waited at Nampa, for a reply to a telegram sent to Jessop, until late in the day; that he finally informed Mr. Bray that he must return to his home, at Caldwell, some nine or ten miles from Nampa; that thereupon Bray requested him to order five ditchers, and stated that, if Jessop could not use the fifth ditcher, Bradbury & Bray would use it themselves; that witness got his team, and drove to his home, at Caldwell, and put his team out, and immediately thereafter, and before ordering said machines from Chicago, he telephoned his partner, Frank R. Coffin, at Boise City, and asked him if Bradbury & Bray were good for five ditchers, at \$1,100 each, and requested him to find out, and let him know; that this all occurred within two hours after he left Nampa. This telephone communication, and Frank R. Coffin's testimony in regard to receiving the same, was objected to, and the admission thereof is assigned as error. It is urged that the same is no part of the *res gestae*, that it took place after the agreement for the sale of the ditchers had been entered into, and was a communication from one of the plaintiffs to his partner, and not in the presence of the defendants, or either of them; that said testimony is self-serving, and too remote to be a part of the *res gestae*. Counsel for appellants contend that the rule applicable to this class of testimony is, that such declarations, to become competent evidence, as part of the *res gestae*, must accompany the act which they are supposed to characterize, and must so harmonize with it as to be, obviously, a part of the same transaction, and in support of this rule cite: Moore v. Meacham, 10 N. Y. 207; Enos v.

Tuttle, 3 Conn. 250; Cherry v. Butler, (Tex. App.) 17 S. W. 1090; Tisch v. Utz, (Pa. Sup.) 21 Atl. 808; Conlan v. Grace, (Minn.) 30 N. W. 880; 1 Whart. Ev. § 265; 2 Whart. Ev. § 1171; Dawson v. Pogue, (Or.) 22 Pac. 610; State v. Daugherty, 17 Nev. 376, 30 Pac. 1074; People v. Dewey, (Idaho) 6 Pac. 103; Binns v. State, 57 Ind. 46. In Moore v. Meacham, supra, the court, in passing upon the question of the admission of certain declarations, said that "the general rule is that declarations, to become a part of the *res gestae*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction,"—and held that the general rule applicable to the admission of such declarations, as a part of the *res gestae*, was the rule which should govern in that case. Enos v. Tuttle, supra, was a case where a plaintiff undertook to introduce declarations of an absconding debtor as evidence against a garnisher, and the court held that such declarations were not evidence for the plaintiff. Cherry v. Butler, supra, held the declarations of payee on draft, narrating the fact that he had twice paid it, were self-serving, and error to admit them. In Tisch v. Utz, (Pa. Sup.) 21 Atl. 808, it was held that declarations of a judgment debtor were not admissible in evidence for the purpose of impeaching the judgment. In Conlan v. Grace, (Minn.) 30 N. W. 880, it is held that "declarations of a party, to be admissible as a part of the *res gestae*, must be contemporaneous with, or at least so connected with, the main fact in issue as to constitute one transaction." Dawson v. Pogue, (Or.) 22 Pac. 610, holds: "Ordinarily, acts and declarations of parties to an action are not competent evidence in their behalf. There are, however, exceptions to the rule." State v. Daugherty, supra, holds: "It is impossible to tie down to time the rule as to declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible, but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gestae*," and that the declaration was simply a narration of past events or occurrences, and was incompetent. In 1 Whart. Ev. § 265, it is held that such declarations are inadmissible, if made so far prior to the act sought to be characterized as to give opportunity for their correction in way of preparation, or, if made so long afterwards, as to leave an interval—which interval should not be measured by time, but by the circumstances of the case—in which excuses, explanations, or aggravations could be got up. 2 Whart. Ev. § 1174, is applicable to the admissions of agents in matters of tort, and not in point. Binns v. State, supra, holds that "a declaration which is simply a narrative of past events * * * is inadmissible in evidence."

The authorities cited state the general rule

applicable to the admission of declarations made by a party, as evidence in his own behalf, and some of them recognize that there are exceptions to the general rule. In some of them time is considered a controlling element, and in others, not. They hold that such declarations, to become competent evidence for the party making them, must be a part of the *res gestae*, or at least so considered. The term "*res gestae*" is used in one class of cases to indicate the very matter in issue, the ultimate thing itself, the thing controverted; and in others the term is used to indicate the surrounding facts of a transaction, which explain or characterize the main fact. In 1 Greenl. Ev. § 108, it is held that the surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury, along with the principal fact, and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion. Whether declarations made after the occurrence of the litigated issue should be admitted as evidence in behalf of the party making them, rests in the sound judicial discretion of the court. O'Connor v. Railway Co., 27 Minn. 173, 6 N. W. 481; State v. Ah Loi, 5 Nev. 82; 1 Greenl. Ev. § 108. In 1 Tayl. Ev. §§ 525, 526, it is stated that "in all these cases, the principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was, at one time, thought necessary that they should be contemporaneous with it, but this doctrine has of late years been rejected, and it seems now to be decided that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential. * * *" In Insurance Co. v. Mosley, 8 Wall. 397, which was an action on an accident insurance policy, the declarations of the deceased as to the cause of the injury from which he died, made shortly after the injury, was held competent evidence, and a part of the *res gestae*. The court, speaking through Mr. Justice Swaine, in regard to certain declarations being part of the *res gestae*, says: "To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate, but this rule is by no means of universal application,"—and quotes with approval from Rawson v. Haigh, 2 Bing. 99, as follows: "It is impossible to tie down to time the rule as to such declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole *res gestae*." Referring

to the doctrine applicable to the admission of such declarations, the court says: "The tendency of recent adjudication is to extend, rather than to narrow, the scope of the doctrine." "Rightly guarded in its application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority." In Board v. Keenan, 55 Cal. 612, Justice McKee, in delivering the opinion of the court, said: "Wharton defines *res gestae* as those circumstances which are the undesigned incidents of a particular litigated act. These incidents may be separated from the act, by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors." In People v. Vernon, 35 Cal. 49, it is held that "declarations, to be a part of the *res gestae*, are not required to be precisely concurrent in point of time with the principal fact. If they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and admissible." See, also, State v. Horan, (Minn.) 20 N. W. 905; Augusta Factory v. Barnes, 53 Amer. Rep. 838; Insurance Co. v. De Wolf, 8 Pick. 56; State v. Jones, (Iowa.) 17 N. W. 911; State v. Ah Loi, 5 Nev. 82; Ross v. Bank, 15 Amer. Dec. 664. In Milne v. Leisler, 7 Hurl. & N. 786, it was held competent for the plaintiff, for the purpose of proving upon whose credit goods sued for were sold, to introduce in evidence a certain letter, written by plaintiff to his agent, requesting him to inquire, as to the financial standing of the defendant, of a person to whom the person receiving the goods had referred him for that purpose. The plaintiff stated in said letter that the defendant was the purchaser of said goods. And it was further held that the jury might look at the whole letter, and although, in itself, it was not evidence of the truth of the facts stated, it might be considered as corroborative of plaintiff's version of the transaction. 1 Greenl. Ev. (Redfield's Ed.) § 108a. In Bouvier's Law Dictionary, (Ed. 1888,) under the head of *res gestae*, the following statement occurs: "In the United States the tendency is to extend, rather than narrow, the scope of the doctrine of *res gestae*. Although, generally, the declarations must be contemporaneous with the event sought to be proved, yet, where there are connecting circumstances, they may, even when made some time afterwards, form a part of the *res gestae*. Insurance Co. v. Mosley, 8 Wall. 397; Railroad

Co. v. Coyle, 55 Pa. St. 402; *Harriman v. Stowe*, 57 Mo. 93; *Brownell v. Railroad Co.*, 47 Mo. 239; *Com. v. Eastman*, 1 Cush. 189. And, in England, the decision of Cockburn, C. J., in *Beddingfield's Case*, 14 Cox, Crim. Cas. 341, is directly contrary, holding that the declarations must be contemporaneous with the event, to be admissible. This decision has been vigorously opposed by Mr. Taylor and others. See 14 Amer. Law Rev. 817; 15 Amer. Law Rev. 1, 71; *Field v. State*, 34 Amer. Rep. 479." From a review of the authorities, I think the decided weight is that time is not necessarily a controlling element or principle in the matter of *res gestæ*, and that declarations made, under circumstances to warrant the court in presuming that they grew out of the litigated issue, and illustrate the true character of the transaction, and were dependent upon it, were not designedly made, or devised for a self-serving purpose, are evidentiary facts, and are not within the general rule applicable to hearsay testimony. Such declarations are admissible, although not made at the exact time of the occurrence of the principal fact in issue. I think the evidence referred to comes within the rule laid down in many of the authorities above cited. The declaration or communication was not a narrative of past events, or of the contract of sale. It was an inquiry, which any prudent business man would naturally make, before he would feel safe in ordering upwards of \$6,000 worth of machinery for a customer whose financial condition was not known to him. He would very naturally want to know the ability of the purchaser to pay. It is true the order for the ditchers had been given and received some two hours before the inquiry under consideration was made, but it was made before the ditchers were ordered, and, as I view it, was made in the midst of the transaction, and before all the conditions were performed which were required to be performed, before the contract became binding upon either party. It was a pertinent inquiry, and I think it one of the reasonable emanations arising out of the contract of purchase, and dependent upon it, that it was not deliberately devised or contrived by the parties, for a self-serving purpose, that it was spontaneously, and not designedly, made, and tends to explain to whom the credit was given. Its truth or falsity was for the jury. The question litigated was, whether the ditchers were sold to Bradbury & Bray, and on their credit. Bray testified that they were sold to Jessop, and he alone became liable for the payment of the purchase price, while Sherman M. Coffin testified that they were sold to Bradbury & Bray, and on their credit. I think the testimony under consideration tends to show to whom the credit was given, and was properly admitted.

Error is alleged because the court held that, under the evidence, no partnership, for the sale of said machines, existed between

Stearns and Sherman M. Coffin. Appellants undertook to show that there was a partnership between Stearns and Coffin, in the sale of said ditchers. Stearns and Coffin both testify that no such partnership existed, and there is not a scintilla of evidence tending to show a partnership. That being true, it was not prejudicial error for the court to so hold.

The fourth error assigned is that the court erred in admitting the testimony of Sherman M. Coffin, in explanation of the sense in which he used the word "guaranty" in his letter of May 24, 1890, to John M. Bray. The letter was introduced as an admission of said respondent, to show that, at the time of writing it, he considered Bradbury & Bray as guarantors, and not as original purchasers. Under this contention, appellants cite several authorities upon the proposition that, when the language of a written contract is neither ambiguous nor technical, parol evidence is not received to explain it. These authorities are not in point, for the reason that said letter is not a written contract, nor a part of one. I understand the rule to be that, when a writing is introduced as an admission, and not as a part of the contract between the parties, it is always permissible for the party who wrote it, and against whom it was introduced, to explain the meaning that he intended to convey. The rule applicable to oral admissions is the proper one to be applied to the evidence under consideration. *Duncan v. Matney*, 77 Amer. Dec. 575; *Smith v. Crego*, 54 Hun, 22, 7 N. Y. Supp. 86; *Bingham v. Bernard*, (Minn.) 30 N. W. 404; *Auzerais v. Naglee*, (Cal.) 15 Pac. 371; *Browne*, Parol Ev. § 6; *Morris v. Railroad Co.*, 21 Minn. 91; *Burke v. Ray*, (Minn.) 41 N. W. 210.

The fifth error assigned is the refusal of the court to strike out that portion of Sherman M. Coffin's testimony in explanation of the word "guaranty," to wit: "We have dozens of entries in our books, at this time, which could show that fact." We cannot consider this objection, for the reason that no exception appears to have been saved in the court below.

The sixth error assigned is that the court erred in permitting Charles Stewart, a witness on behalf of plaintiff, to testify as follows: "I rode up to Bray, who was out on the ditch, where Jessop's contract was. I rode up to Bray, and think he wasn't using very good language towards Jessop, because Jessop was getting behind. He says, 'I am in the soup with Coffin Bros. for those damned ditchers.'" Appellants contend, (1) that, if this evidence was introduced for the purpose of establishing plaintiffs' case, as an admission of the contract sued on, it should have been introduced as a part of the testimony in chief, and not in rebuttal; (2) if it was introduced to impeach Bray, it was error to admit it, for the reason that Bray's attention was not called to it when he was on the witness stand. The first objection does

not appear to have been taken in the court below, and cannot be considered for that reason. The second is not well taken, for the reason that statements and admissions, made by a party to a suit, may be proved without first calling the party's attention to them. The rule that the attention of the witness must be called to the statement made, and the time and place of making the same, in order to lay the proper foundation for impeachment, does not apply to this case. 1 Thomp. Trials, § 497; Collins v. Mack, 31 Ark. 685, 694; Lucas v. Flinn, 35 Iowa, 9.

After a careful review of all the evidence, I find a substantial conflict on the material issues, and, where the material issues are submitted to the jury, on instructions of the court not excepted to by appellants, the verdict of the jury will not be disturbed by the appellate court; nor will the order overrul-

ing a motion for a new trial be reversed, on the ground of insufficiency of the evidence to justify the verdict, when there is a substantial conflict in the evidence. Ainslie v. Printing Co., 1 Idaho, 641; Du Brutz v. Jessup, 54 Cal. 118; Campe v. Meierdiereks, 87 Cal. 290, 25 Pac. 419; Lynch v. Welby, 87 Cal. 441, 25 Pac. 584; Garrard v. White, (Ky.) 14 S. W. 966; Ketcham v. Barbour, (Ind. Sup.) 26 N. E. 127.

I find no reversible error in the record. The judgment of the court below is affirmed, with costs of this appeal in favor of respondents.

HUSTON, C. J., took no part in the hearing or decision of this case.

MORGAN, J., concurs in the result.

* * * * *

CAULKINS v. HELLMAN.

(47 N. Y. 449.)

Court of Appeals of New York. 1872.

Action to recover for wines and casks sold.

Stephen K. Williams, for appellant. E. G. Latham, for respondents.

RAPALLO, J. The instructions to the jury as to the legal effect of the delivery of the wine at Blood's Station in conformity with the terms of the verbal contract of sale were clearly erroneous. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract.

Where a valid contract of sale is made in writing a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price; and this acceptance must be voluntary and unconditional. Even the receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. This distinction seems to have been overlooked in the charge. The learned judge instructed the jury, as a matter of law, that if they were satisfied that the wine or any portion of it was actually delivered in pursuance of the verbal contract, that circumstance was sufficient to take the contract out of the statute of frauds, and the contract was a valid one, and might be enforced notwithstanding it was not in writing. The attention of the jury was directed to the inquiry whether the plaintiffs had faithfully performed their part of the contract rather than to the action of the defendant, and the judge proceeded to state that if the wine was delivered to the express company at Blood's Station in good order, in merchantable condition, and corresponded in quality and all substantial and material respects with the samples, then he instructed the jury as a matter of law, that if they found the contract as Gordon testified with respect to the place of delivery, that was a complete delivery under the contract, and passed the title from the plaintiffs to the defendant, and the plaintiffs were entitled to recover the contract price of the wines.

The plaintiff's counsel suggests in the statement of facts appended to his points,

that Gordon was the agent of the defendant, to accept the goods at Blood's Station. But this statement is not borne out by the evidence; Gordon was the agent of the plaintiffs for the sale of the goods; it was incumbent upon them to make the shipment. All that Gordon testifies to is that the defendant requested him to make the best bargain he could for the freight. He does not claim that he had any authority to accept the goods for the defendant.

According to the defendant's testimony Gordon clearly had no such authority, nor did the defendant designate any conveyance, and the judge submitted no question to the jury as to the authority either of Gordon or the express company to accept the goods. On the contrary, he repeated that if when the wine was delivered at Blood's Station it was in good order and corresponded with the samples, the plaintiffs would be entitled to a verdict for the contract price, upon the ground that the parties by the contract (assuming it to be as claimed by the plaintiffs), fixed upon that station as the place of delivery; "that it was true that the defendant was not there to receive it, and had no agent at Blood's Station to receive it, and had no opportunity to inspect it there; but that that was a contingency he had not seen, and which he might have guarded against in the contract."

It is evident that the learned judge applied to this case the rule as to delivery, which would be applicable to a valid, written contract of sale, but which is inapplicable when the contract is void by the statute of frauds.

The effect of the delivery of goods at a railway station, to be forwarded to the vendee in pursuance of the terms of a verbal contract of sale, was very fully discussed in the case of *Norman v. Phillips*, 14 Mees. & W. 277, and a verdict for the plaintiff founded upon such a delivery, and upon the additional fact that the vendor sent an invoice to the vendee, which he retained for several weeks, was set aside. The English authorities on the subject are reviewed in that case, and the American and English authorities bearing upon the same question are also referred to in the late cases of *Rodgers v. Phillips*, 40 N. Y. 519, and *Cross v. O'Donnell*, 44 N. Y. 661. The latter case is cited by the counsel for the plaintiffs as an authority for the proposition that a delivery to a designated carrier is sufficient to take the case out of the statute; but it does not so decide. It holds only that the receipt and acceptance need not be simultaneous, but that they may take place at different times, and that after the purchaser had himself inspected and accepted the goods purchased, the delivery of them by his direction to a designated carrier was a good delivery, and the carrier was the agent of the purchaser

to receive them. No question however arises in the present case as to a delivery to a designated carrier, as the evidence in respect to the agreed mode of delivery is conflicting, and no question of acceptance by the carrier as agent for the defendant was submitted to the jury.

The judge submitted to the jury two questions, to which he required specific answers.

1st. Was the wine delivered at the railroad station at the time agreed upon by the parties, and was it then in all respects in good order, and like the samples exhibited by the plaintiff to the defendant? and,

2d. Was the wine accepted by the defendant after it reached his place of business in New York?

The jury answered both of these questions in the affirmative, and it is now claimed that the answer to the second question renders immaterial any error the judge may have committed in respect to the effect of the delivery at the station.

It is difficult to find any evidence justifying the submission to the jury of the second question; but no exception was taken to such submission. The motion for a nonsuit would have raised that point, were it not for the fact that there was evidence to go to the jury on the claim of \$52 for barrels, and this precluded a nonsuit. We think however that the error in the charge may have misled the jury in passing upon the second question; at all events, it is not impossible that it should have done so. Having been instructed that upon the fact as they found it in respect to the agreement for a delivery at Blood's Station, the title to the goods had passed to the defendant before the receipt of them at New York, and that their verdict must be for the plaintiffs, they may have examined the question of his acceptance of them at New York with less scrutiny than they would have exercised had they been informed that the result of the case depended upon their finding on that question. And the construction of the defendant's acts and language may, in some degree, have been influenced by the consideration that when the wine arrived in New York the title had, according to the theory on which the case was submitted to them, passed to the defendant, and he had no right to reject the wines. Furthermore, we think the judge erred in excluding the evidence of the contents of the telegram which the defendant attempted to send to the plaintiffs immediately upon the receipt of the wine. If, as was offered to be shown, it stated that he declined to accept the wine, it was material as part of the *res gestæ*. A bona fide attempt, immediately on the receipt and examination of the wine, to communicate

such a message, was an act on his part explaining and qualifying his conduct in receiving the wine into his store and allowing it to remain there. And even though the message never reached the plaintiffs, it bore upon the question of acceptance by the defendant. The objection to the evidence of the contents of the telegram was not placed on the ground of omission to produce the original, and the judge in his charge instructed the jury that the attempt to send this telegram did not affect the plaintiffs' rights, for the reason that it was not shown to have been received by them, and this was excepted to. In *Norman v. Phillips*, 14 Mees. & W. 277, the defendant was allowed to prove that on being informed by the railway clerk that the goods were lying for him at the station, he said he would not take them, and stress was laid upon the fact. Yet this statement to the clerk was not communicated to the plaintiffs. Evidence of an attempt to send a message to them to the same effect, though unsuccessful, would have been no more objectionable than the declaration to the clerk. The acts of the defendant at the time of the receipt of the goods, and his bona fide attempt to communicate to the plaintiffs his rejection of them were I think material and competent to rebut any presumption of an acceptance arising from their retention by him.

The judge was requested to instruct the jury that the true meaning of the defendant's letter of March 31 was a refusal to accept the wine under the contract. A careful examination of that letter satisfies us that the defendant was entitled to have the jury thus instructed. The letter clearly shows that the defendant did not accept or appropriate the wines. After complaining in strong language of their quality and condition, and of the time and manner of their shipment, he says to the plaintiffs, "What can be done now with the wine after it suffered so much, and shows itself of such a poor quality? I don't know myself and am awaiting your advice and opinion." He concludes by expressing his regret that their first direct transaction should have turned out so unsatisfactory, and by stating that he cannot be the sufferer by it, and he awaits their disposition.

This language clearly indicates an intention to throw upon the plaintiffs the responsibility of directing what should be done with the wine, and is inconsistent with any acceptance or appropriation of it by the writer.

For these reasons the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

POWDER RIVER LIVE-STOCK CO. v. LAMB.

(56 N. W. 1019, 38 Neb. 339.)

Supreme Court of Nebraska. Nov. 21. 1893.

Error to district court, Stanton county; Powers, Judge.

Action by Charles L. Lamb against the Powder River Live-Stock Company. Plaintiff had judgment, and a new trial was denied. Defendant brings error. Reversed.

C. C. McNish and Allen, Robinson & Reed, for plaintiff in error.

W. W. Young and John A. Ehrhardt for defendant in error, cite in support of the proposition that, to be available as a defense, the statute of frauds must be specially pleaded. *Lawrence v. Chase*, 54 Me. 196; *Graffam v. Pierce*, 9 N. E. 819, 143 Mass. 386; *Brigham v. Carlisle*, 78 Ala. 243; *Martin v. Blanchett*, 77 Ala. 288; *Guyann v. McCauley*, 32 Ark. 97; *Wynn v. Garland*, 19 Ark. 38.

NORVAL, J. This was an action commenced by Charles L. Lamb to recover of plaintiff in error \$1,849.15, and interest thereon, as a balance due for a quantity of corn alleged to have been sold and delivered by plaintiff to the defendant. The amended petition upon which the case was tried alleges: "(1) That said defendant is a corporation duly organized and existing under the general laws of the state of Colorado, and doing business in Stanton county, Neb. (2) That some time in the month of October, 1886, the precise date whereof the plaintiff is unable to more specifically state, the plaintiff and defendant entered into a verbal contract, by the terms of which the plaintiff sold to said defendant, above named, all the corn that he then had on hand, including the crop of corn then standing in the fields of the plaintiff; and, in consideration of the sale and delivery of said corn to the defendant, the said defendant agreed to pay the plaintiff the market price per bushel paid for corn in the said county of Stanton, in the state of Nebraska, on any day, to be selected by the plaintiff, between the time of delivery of said corn and the month of May, 1888, and on the day so selected by the plaintiff the amount then due the plaintiff should at once become due and payable. (3) That in pursuance of said contract the plaintiff delivered to the defendant, in the month of November, 1886, 143 bushels and 35 pounds of ear corn, and from the 21st day of December, 1886, to the 5th day of April, 1887, 782 bushels and 30 pounds of ear corn, and on the 30th day of December, 1886, 1,259 bushels of shelled corn, and in the month of January, 1887, 5,090 bushels of shelled corn and 25 pounds, and that the total number of bushels sold and delivered amounted, in the aggregate, to 7,275 bushels; and the plaintiff states that he is unable to more fully state the time and the amount of the delivery of said corn than in this paragraph stated. (4) On the 1st day

of February, 1888, the plaintiff, in order to fix and establish the price to be paid by the defendant for the corn delivered as aforesaid, served notice on the defendant that he had selected the market price per bushel paid for corn in Stanton county, Neb., on that date, to wit, the 1st day of February, 1888. (5) That the market price paid for corn on the said 1st day of February, 1888, in Stanton county, Neb., was thirty-five cents per bushel. (6) That on the 4th day of January, 1887, the defendant advanced to the plaintiff on said corn the sum of two hundred (200) dollars, and on the 12th day of January, 1887, the further sum of four hundred and fifty (450) dollars, for which money so advanced the plaintiff afterwards agreed to pay the defendant interest thereon until the date of the selection of the market price per bushel to be paid for said corn. (7) That there is due from the defendant to the plaintiff for the said corn so delivered under the terms of said contract the sum of two thousand five hundred and forty-six and twenty-five one-hundredths (2,546.25) dollars, no part of which has been paid, except the said sum of \$650, which, with the interest thereon, as agreed between plaintiff and defendant, amounts to the sum of \$697.10. (8) That, after allowing to the defendants all just credits, there is still due and unpaid from the defendant to the plaintiff the sum of one thousand and eight hundred forty-nine and fifteen one-hundredths (1,849.15) dollars, together with the interest thereon at the rate of seven per cent. from the said 1st day of February, 1888."

The defendant interposed a general demurrer to the amended petition, which was overruled by the court, and an exception was taken to the decision. The defendant then filed an answer alleging: "(1) That on or about the 24th day of December, 1886, L. R. Crosby, as the general manager of the feeding department of said defendant, made an oral agreement with said plaintiff, whereby the said plaintiff was to sell and deliver at the ranch of defendants in Stanton county, Nebraska, all the corn and oats that he then owned near Pilger, and two car loads of corn to be shipped from Stanton, and said defendant agreed to pay said plaintiff for said corn and oats the average market price between the Stanton and Pilger market on the day that said plaintiff selected and called for his money, between about the 24th day of December, 1886, and the 1st day of May, 1887, and that said plaintiff was to reduce said contract to writing, in duplicate, and sign them, and forward them to said L. R. Crosby for the same to be signed by said defendant, and one to be returned to said plaintiff. (2) That said plaintiff failed and neglected to reduce said contract to writing as agreed, and there is no note or memorandum of said agreement as required by law. (3) That in accordance with said oral agreement made on or about the 24th day of December, 1886, with said L. R. Crosby, for

said defendant, the said plaintiff delivered at the ranch of said defendant in Stanton county, Nebraska, at various dates, a total of nine hundred and twenty-five (925) bushels and sixty-five (65) pounds of ear corn, and six thousand three hundred and forty-nine (6,349) bushels and thirty-five (35) pounds of shelled corn; and nineteen hundred and ninety-four (1,994) bushels and twenty-seven (27) pounds of oats. (4) That on the 25th day of April, 1887, in accordance with the contract made on or about the 21st day of December, 1886, the said plaintiff had a settlement with said defendant as to the oats, and on said date defendant paid said plaintiff for said oats the sum of \$359.10. (5) That on the 4th day of January, 1887, the said defendant loaned to said plaintiff the sum of \$200, and on the 12th day of January, 1887, said defendant loaned said plaintiff the further sum of \$450; and said plaintiff agreed to pay said defendant interest on said money, and that the same was to be settled and adjusted, and deducted from amount that defendant might owe the plaintiff. (6) The defendant, in further answer to the petition of the plaintiff, admits the allegation contained in paragraph one of said petition; but, as to all other paragraphs in said petition, it denies each and every allegation therein contained."

For reply, the plaintiff admits that he delivered the quantity of oats and corn stated in the answer; denies that the same were delivered under the contract set up by the defendant in its answer; alleges that the oats and corn were sold and delivered under separate and distinct contracts; denies each and every other allegation set forth in the answer.

The action was tried in the court below to a jury, who returned a verdict in favor of the plaintiff for \$2,142.38. The plaintiff filed a remittitur of \$1.25, and the court overruled the defendant's motion for a new trial, and entered judgment in favor of the plaintiff upon the verdict of the jury. The defendant brought the case to this court for review by proceedings in error.

The defendant objected in the district court to the introduction of any evidence in the case, for the reason that the contract stated in the petition is within the statute of frauds, and is therefore void, which objection was overruled by the court. The plaintiff thereupon introduced evidence tending to prove every allegation of the petition, and rested. The testimony on behalf of the defendant tended to establish that the contract entered into between the parties, relating to the sale and purchase of the corn, is the one pleaded in the answer; that the corn was delivered by the plaintiff to the defendant under said agreement; and that corn, at the time the same was delivered, as well as in May, 1887, was worth, on the market in Stanton county, 20 cents per bushel. The court, at the request of the defendant,

submitted to the jury special findings, which were answered by them, and returned with their general verdict. By the third finding, they found that the contract between the parties was as claimed by the plaintiff, and that the corn was delivered thereunder.

The most important question presented for our consideration is whether or not the contract set out in the petition is within the statute of frauds. Section 8 of chapter 32 of the Compiled Statutes declares that "in the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. First. Every agreement that by its terms is not to be performed within one year from the making thereof. Second. Every special promise to answer for the debt, default, or misdoings of another person. Third. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry. Fourth. Every special promise by an executor or administrator to answer damages out of his own estate." The contention of the plaintiff in error is that the contract declared on is void under the first subdivision of the section above quoted, and that the same is not actionable or enforceable in the courts for the reason the agreement rested solely in parol, and was not to be performed by either party within the period of one year from the date of the making of the same. The defendant in error, in his argument, insists that the agreement in question does not fall within the clause of the section already mentioned; that the statute only applies to executory contracts, and not one which has been fully performed on one side. The authorities upon the question are divided. Some of the courts of the country hold that an action cannot be maintained upon a parol agreement, which, by its terms, is not to be performed within a year, even though made upon a valuable consideration, fully executed, while other courts of equal standing and ability lay down the doctrine that full performance on one side takes the contract out of the statute, and that it is enforceable. We are not now called upon to examine the conflicting decisions, or to determine which is the true doctrine, as the question does not necessarily arise in this case. If we are able to comprehend the force and effect of the agreement in question, it is not within the scope of the statutory provision set out above. A contract, in order to be within the purview of said section, must be such that, by its terms, it cannot be performed within one year from the making thereof. The statute does not include a verbal agreement which may possibly or probably not be performed within a year, nor does it apply to a parol contract, in the terms of which there is nothing inconsistent with a full and complete performance within such period. When a contract, not in writing, by its

terms, or by any fair and reasonable construction of its provisions, is capable of being performed within a year, it is not within the statute. This was settled by the adjudications in this court in *McCormick v. Drummert*, 9 Neb. 388, 2 N. W. 729; *Connolly v. Giddings*, 24 Neb. 131, 37 N. W. 939; and *Kiene v. Shaeffling*, 33 Neb. 21, 49 N. W. 773; and it is unnecessary to refer to the decisions of other courts sustaining the doctrine of our own cases.

Let us examine and see whether the agreement alleged and proved was capable of performance within a year from the time the same was entered into. The plaintiff below sold to the defendant all of his corn, including the crop there in the field. The contract contained no stipulation as to the time when the corn should be delivered to the defendant. True, by the terms of the agreement, plaintiff was to receive for the corn the market price paid for such grain in Stanton county on any day that should be thereafter designated by him, between the time of delivery and May, 1888, but this provision did not bring the contract within the statute. Although the agreement was not performed within a year from its making, as regards the selection of the date upon which to fix the price the seller should receive for the corn, yet there was nothing in the terms thereof which prevented it from being performed within the year. Under the terms of the agreement, plaintiff had a perfect right, had he so desired, to have selected such date at once, and without delay,—even on the next day after the corn was delivered. It was entirely optional with him to do so or not. The agreement was therefore capable of performance within a year from its making, and is not void by reason of the statute under consideration. No case can be found reported in the books, in the opinion of the writer, of similar facts, where it has been held that such a contract was within the purview of the statute. On the contrary, the doctrine established by the adjudications of this country is that, in order to bring a case within the operation of the statute of frauds, there must be an express and specific stipulation in the contract that it is not to be performed within the year, or it must appear therefrom that it was not the intention of the parties that the agreement should be performed within that period. *Supra*; *Treat v. Hiles*, (Wis.) 32 N. W. 517; *Baker v. Lauterback*, (Md.) 11 Atl. 703; *Aiken v. Nogle*, 47 Kan. 96, 27 Pac. 825; *Durham v. Hiatt*, 127 Ind. 514, 26 N. E. 401; *Kent v. Kent*, 62 N. Y. 560; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Horner v. Prazier*, (Md.) 4 Atl. 133; *Smalley v. Greene*, (Iowa.) 3 N. W. 78.

The next contention of plaintiff in error is that the contract is void under section 9 of said chapter 32, which is in the following language: "Sec. 9. Every contract for the sale of any goods, chattels, or things in ac-

tion, for the price of fifty dollars or more shall be void unless:—First—a note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby; or second—unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action, or, third—unless the buyer shall, at the time, pay some part of the purchase money." The contract declared upon in the amended petition is a verbal one, for the sale of a quantity of corn exceeding in value the sum of \$50. No part of the purchase money was paid at the time the contract was entered into. This is conceded. But the plaintiff below insists that the stipulations in the contract have been fully performed on his part; hence, the statute of frauds does not attach. The delivery of the corn by the plaintiff to the defendant is averred in the petition, but it is nowhere alleged in the pleading that the defendant accepted or received any part thereof. A delivery alone by the vendor of the thing sold is insufficient to take a parol contract for the sale of goods, of the price of \$50 or more, out of the statute, but there must also be a receipt and acceptance by the buyer of at least a part of such goods under and in pursuance of the terms of the contract. In *Reed* on the Statute of Frauds, (volume 1, § 262,) the author says: "There must be both delivery and acceptance; and both parties must partake in the same act * * * And it has been said that, certainly, unless 'accept' means more than 'received,' as surely it must,—for otherwise the word 'deliver' would, of itself, have sufficed,—acceptance must mean some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so. To constitute acceptance two acts are necessary: The goods must be accepted, and actually received. No act of the seller will amount to acceptance." The doctrine of the text is amply sustained by numerous judicial decisions. See the following authorities: *Ex parte Parker*, 11 Neb. 399, 9 N. W. 33; *Caulkins v. Hellman*, 47 N. Y. 449; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892; *Hansen v. Roter*, (Wis.) 25 N. W. 530; *Jamison v. Simon*, (Cal.) 8 Pac. 502; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465; *Hardware Co. v. Mullen*, 33 Minn. 195, 22 N. W. 294; *Taylor v. Mueller*, (Minn.) 15 N. W. 413. In *Ex parte Parker*, *supra*, this court quoted with approval the following language used by the New York court in the opinion in *Caulkins v. Hellman*, 47 N. Y. 449: "No act of the vendor alone, in performance of a contract void by the statute of frauds, can give validity to such contract. * * * Where a valid contract of sale is made in writing, a delivery pursuant to such contract will pass the title at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract will pass the title to

the vendee without any acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be, not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee, to pass the title, or make the vendee liable for the price." Acceptance is the receipt of a thing with the intention to retain it. In order to constitute a binding acceptance under a contract for the sale of personal property, invalid by the statute of frauds, there must be some equivocal act on the part of the purchaser showing an intention to accept and appropriate the property as owner. *Stone v. Browning*, 68 N. Y. 601; *Simpson v. Krumdick*, 28 Minn. 355, 10 N. W. 18; *Taylor v. Mueller*, (Minn.) 15 N. W. 413. In a suit upon a contract within the statute of frauds, the petition must state facts taking the contract out of the statute, or the pleading will be demurrable. *Babcock v. Meek*, 45 Iowa, 137; *Burden v. Knight*, 82 Iowa, 584, 48 N. W. 985. The conclusion is irresistible that the allegation of the delivery of the corn is not sufficient to take the contract out of the operation of the statute, and therefore the demurrer to the amended petition should have been sustained.

It is urged that the defendant waived its exception to the ruling on the demurrer by answering to the merits. Conceding this point to be well taken, still the question of the statute of frauds was repeatedly raised during the trial on the introduction of testimony to establish the contract, and to show the defendant accepted the corn under the terms of the parol agreement. This evidence was admitted over the objection of the defendant that it is not alleged in the petition that it accepted or received any part of the corn sued for, and that the contract was void under the statute. This evidence was clearly inadmissible, without the pleading being amended. It is a fundamental rule that the *allegata et probata* must agree.

It is claimed that the statute of frauds is not available as a defense in this case for the reason that it is not set up in the answer. The defendant, in its pleading, denies the making of the contract upon which the action was brought; sets up an entirely different agreement for the purchase and sale of the corn. There was no waiver of the statute by the failure to plead it as a special defense. Under the general denial, the defendant had the right to avail itself of the invalidity of the agreement under the statute of frauds. The plaintiff, in order to recover, was obliged to prove his contract substantially as alleged, and a receipt and acceptance of the corn under it. *Browne, St. Francis*, § 511; *Russell v. Railway Co.*, (Minn.) 39 N. W. 302; *Cosand v. Bunker*, (S. D.) 50 N. W. 84; *Tatge v. Tatge*, 34 Minn. 272, 25 N. W. 596 and 26 N. W. 121; *Taylor v. Allen*, 40 Minn. 433, 42 N. W. 292; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465;

Berrien v. Southack, (City Ct. N. Y.) 7 N. Y. Supp. 324; *Smith v. Theobald*, (Ky.) 5 S. W. 394; *Wiswell v. Teftr*, 5 Kan. 263; *Bonham v. Craig*, 80 N. C. 224; *Popp. v. Swanke*, 68 Wis. 364, 31 N. W. 916. The last was an action to enforce specifically the performance of an oral agreement for the sale of land. The defendant neither pleaded the statute of frauds, nor objected to the admission of evidence on the trial because the contract was within the statute, but at the close of the trial requested the court to find as a fact that the contract rested in parol, and, as a conclusion of law, that it was void. It was held that the question of the validity of the agreement was sufficiently raised. There are a few cases which hold that the statute of frauds must be specially pleaded, to be available, some of which are cited in the brief of defendant in error, but the decided weight of the decisions, as well as the better reason, is the other way.

We will next notice one assignment of error based upon a ruling of the court on the introduction of the testimony. The plaintiff below was permitted to prove, over objections of the defendant, that the contract upon which the action was brought was made with the defendant through its general manager, J. A. Brome. It is insisted that this testimony was inadmissible until it had first been shown that Brome had authority to make such a contract. We do not agree with counsel in this proposition. It had been shown by competent evidence that Mr. Brome was the general manager of the defendant corporation, before any attempt was made to prove the contract entered into by him for his company for the purchase of the corn. Therefore, it was unnecessary to show that he had authority to make the contract, the presumption being that he was invested with such power.

Complaint is made of the giving of the fourth paragraph of the court's charge to the jury, which is as follows: "(4) The defendant, in his [its] answer, denies the making of the contract sued on, and alleges that the price agreed to be paid for the corn purchased of the plaintiff was the average market price between Stanton and Pilger markets, in said county, on a day to be selected by the plaintiff, between December 24, 1886, and May 1, 1887." The above was one of several instructions given, stating the issues in the case, and, when taken in connection with the other instructions, was not misleading. It clearly, and in concise language, stated to the jury one of the issues presented by the pleading and the evidence.

Exception was taken to the giving of the following instruction: "(8) But, if you find that there was no agreement made as to the price the plaintiff was to receive for said corn, then you should award him for the corn received by the defendant, and unpaid for, the fair market value of the same at the time of its delivery as shown by the evidence,

If any such evidence is before you, with interest thereon from the time of its delivery at the rate of seven per cent. per annum." This instruction should not have been given. The action is grounded upon an express contract. The petition contains no allegation of a quantum meruit. Where a contract for the sale of personal property is void under the statute of frauds, and there has been a delivery of the thing sold to the purchaser, and an acceptance thereof by him, the plaintiff may recover the reasonable value of the property, if his petition is so framed; but a party cannot recover on a quantum meruit, where he pleads and relies solely upon a special contract. *Eyser v. Weissgerber*, 2 Iowa, 463; *Freher v. Geeseka*, 5 Iowa, 472; *Formholz v. Taylor*, 13 Iowa, 500; *Imhoff v. House*, 36 Neb. 28, 53 N. W. 1032. The instruction under consideration was in direct conflict with instruction No. 5, given by the court, which told the jury that, "before the plaintiff is entitled to a verdict for the amount sued for, it is incumbent upon him to prove by a preponderance of the evidence that he made the contract with the defendant as alleged, whereby the defendant agreed to pay the plaintiff the market price of the corn in Stanton county on a day selected by him, between the time of delivering the same and the 1st of May, 1888." By the one instruction the jury were informed that the plaintiff could only recover in case the evidence established a special contract, while by the other they were told he was entitled to the market value of the corn, even though there was no stipulation as to the price he was to receive therefor. These conflicting statements of the law before the jury left them in doubt as to the paragraph upon which they should rely. It should be stated that instruction No. 8 was predicated up-

on evidence introduced by the defendant, and against the objection of the plaintiff below, showing the market value of the corn at the time of its alleged delivery. We are persuaded, however, that the defendant was not in the least prejudiced by the giving of this instruction, since, had the jury, in arriving at their verdict, allowed the plaintiff the market value of the corn, the recovery would have been scarcely one-half the sum stated in the verdict. It is obvious that the recovery was upon the basis of the special contract alleged by the plaintiff.

The defendant asked, and the court refused to give, the following instruction: "(12) If the contract claimed by the plaintiff in his petition was wholly oral,—that is, by word of mouth,—and no part of the purchase money was paid, or no part of the corn was delivered thereunder, then the plaintiff has failed to make out his case, and your verdict must be for the defendant. And there would be no such delivery of the corn to the defendant, if the plaintiff simply stored his corn, or a part of it, in the defendant's crib, under an arrangement whereby it was to remain his property until such time as he saw fit to sell it to the defendant." This request to charge correctly states the law relating to the statute of frauds, which was one of the questions in the case, and should have been submitted to the jury. It was not covered by any instruction given, and it was error to refuse it. *Bank v. Carson*, 30 Neb. 104, 46 N. W. 276.

There are other errors assigned upon the giving and refusing of instructions, which need not be noticed. The judgment of the district court is reversed, and the cause remanded for further proceedings, with leave to the plaintiff to amend his petition, if he so desires. The other judges concur.

LEGGETT & MEYER TOBACCO CO. v.
COLLIER et al.

(56 N. W. 417, 89 Iowa, 144.)

Supreme Court of Iowa. Oct. 9, 1893.

Appeal from district court, Lee county;
J. M. Casey, Judge.

Action of replevin. Verdict and judgment
for defendants. Plaintiff appeals.

Craig, McCrary & Craig, for appellant. F.
T. Hughes and James C. Davis, for appel-
lees.

KINNE, J. 1. Plaintiff, a corporation, was a manufacturer of tobacco in St. Louis, Mo. Defendants Collier, Robertson & Hambleton were a firm of wholesale grocers, residing and doing business in the city of Keokuk, Iowa. At and prior to December, 1890, said firm had placed a standing order with plaintiff for shipment of 35 boxes of "Star" tobacco on every Monday morning. A shipment was made to said firm in accordance with said order on Monday, December 8, 1890. On said day, and after the shipment had been made, plaintiff received the following letter from said firm, dated the 6th of December, 1890: "Gents: Please omit our shipment of this week on Star tobacco, and follow next week as usual, and oblige, yours, etc., Collier, Robertson & Hambleton." Plaintiff at once wrote to said firm that the tobacco had been shipped before the receipt of their letter, and said they would omit the next week's shipment. No reply was received to this letter. The tobacco arrived in Keokuk on December 9, 1890, and was delivered to said firm at their store. On December 10, 1890, defendant firm executed to the defendant Smith, trustee, two chattel mortgages on all property of the firm, to secure certain creditors in the aggregate sum of about \$83,000. The trustee on the same day took possession of all the property covered by the mortgages, including the tobacco in controversy. Thereafter plaintiff began this action, and replevined said tobacco. Under the direction of the court, the jury returned a verdict for the defendant Smith, trustee.

2. It is insisted that the mortgages under which the defendant trustee holds the goods are void, because the acknowledgments thereto are defective. The acknowledgment to the first mortgage recites that on December 10, 1890, before the notary, "personally appeared Collier, Robinson & Hambleton, by Hugh Robertson, of said firm, personally known to me to be the identical person who signed the name of the said firm to the above mortgage as mortgagors, and to be a member of said firm, and acknowledged the execution thereof to be the voluntary act and deed of said firm, for the uses and purposes therein expressed; and also on the same day the other members of said firm acknowledged the execution of said instrument to be

the voluntary act and deed of said firm." The acknowledgment of the second mortgage recites that before the notary "personally appeared Collier, Robinson & Hambleton, by each one of said firm, and who are personally known to me to be the identical persons who signed the mortgage, and to be a member of said firm, and one of whom signed the name of said firm to the above mortgage as mortgagors, and acknowledged the execution thereof to be the voluntary act and deed of said firm, for the uses and purposes therein expressed." For the purposes of this action it is not material whether the acknowledgments were defective or not, since the instruments were the act of the partnership, and, as between the parties thereto, were valid without any acknowledgment, and inasmuch as it appears without dispute that the mortgagee trustee took actual possession of all the property covered by said instruments several days prior to the commencement of plaintiff's action. The effect of an acknowledgment would be to entitle the mortgages to be filed for record and recorded, when they would be notice to the world. The same purpose is accomplished if the mortgagee actually takes possession of the property. There can be no better notice to a claimant of property which is chattel mortgaged than the fact that the mortgagee is in possession of it. "If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody if it was previously valid between the parties, although it be not acknowledged or recorded, or the record be ineffectual by reason of any irregularity. The subsequent delivery cures all such defects, and it also cures any defect there may be through an insufficient description of the property. The taking possession is an identification and appropriation of the specific property in the mortgage." Jones, Chat. Mortg. § 178; Cobbey, Chat. Mortg. § 626; *Fromme v. Jones*, 13 Iowa, 474; *Gaar v. Hurd*, 92 Ill. 326.

3. After the introduction of the testimony, the court orally directed the jury to return a verdict for the defendant. Exceptions were taken because the direction was not in writing. Such a direction is in no sense an instruction, such as is contemplated by Code, §§ 2784-2789, inclusive. *Stone v. Railroad Co.*, 47 Iowa, 82; *Milne v. Walker*, 59 Iowa, 186, 13 N. W. Rep. 191; *Young v. Mattress Co.*, 79 Iowa, 419, 44 N. W. Rep. 693.

4. The main question involved in this case is, in whom was the title or right of possession to the tobacco when the writ in this action was served? If by reason of the acts of the parties the title to the tobacco passed to the defendant firm, then the trustee was the rightful holder of it when this action commenced, and the court below properly direct-

ed a verdict for him. The order for the tobacco having been accepted, and acted upon by plaintiff, by delivering the goods to the railway company for carriage to the defendant firm, it was not within the power of said firm to successfully countermand it by any notice, no matter when mailed, which did not reach the seller prior to the delivery of the goods to the carrier. Such delivery, prior to the countermand of the order, vested in the defendant firm the title to the goods, subject to the exercise of the right of stoppage in transit by the seller. So long as the order had not been accepted by a delivery of the goods to the carrier, it might be countermanded; not so, however, after the act of acceptance was complete. In the case at bar there was no undertaking by the vendor to deliver the goods at the place of business of the defendant firm, nor did the vendee designate a special carrier by whom the delivery should be made. In the absence of such designation and undertaking, the rule is that a delivery to the common carrier, in the usual and ordinary course of business, transfers title and possession of the property to the vendee, subject, as we have said, to the exercise by the vendor of the right of stoppage in transit. *Garretson v. Selby*, 37 Iowa, 531; *Alsberg v. Latta*, 30 Iowa, 445; *Whitlock v. Workman*, 15 Iowa, 354; *Benj. Sales*, (Bennett's Ed. 1892.) § 181; 21 Amer. & Eng. Enc. Law, pp. 497-499, 529; *Sarbeck v. State*, (Wis.) 26 N. W. Rep. 542; *Falvey v. Richmond*, (Ga.) 13 S. E. Rep. 261; *McLaughlin v. Marston*, (Wis.) 47 N. W. Rep. 1058; *Bacharach v. Freight Line*, (Pa. Sup.) 19 Ad. Rep. 409; *Kessler v. State*, (Minn.) 44 N. W. Rep. 794. *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. W. Rep. 472, was a case where plaintiff, a manufacturer of liquors at Frankfort, Ky., and having a wholesale house at Cincinnati, Ohio, took an order orally while in Michigan for two barrels of whisky. He sent the order to his distillery at Frankfort, and it was shipped from there to Ryan & McCarney, at Detroit, Mich. The whisky was shipped February 19, 1887. February 26, 1887, the firm telegraphed plaintiff: "Cancel order. Will explain by mail." Plaintiff responded: "Goods were shipped the 21st. Receive, and wait further advice." No other communication passed between the parties till the goods were disposed of. The whisky arrived in Detroit in due time. The consignees paid the freight, and placed the whisky with their stock. March 9th defendant, who held an account against the consignees for \$215, purchased the whisky for \$220, receipting his account and paying \$5 in addition, and took the whisky. He purchased in good faith, and without notice that there was any claim against the property. After the sale, one of the consignees caused a telegram to be sent the plaintiff that consignees had

failed. Plaintiff sued in trover for the conversion of the whisky. It was held that the sale was completed; that a "verbal order, followed by delivery and acceptance, is enough, under the statute of frauds, to complete the sale." In the case at bar the attempted countermand of the order was a recognition of the existence of the order to ship. The testimony shows that the goods were in fact received at the store of defendant firm, and treated the same as other goods. There was no act of the firm, after they must have known that the goods had in fact been shipped prior to the receipt of their letters, which tended to show that they did not consider and treat the tobacco as their property. Again, there is nothing to show that prior to the time plaintiff became aware that the defendant firm had failed it made any claim to the goods. It did not recognize the countermand of the order as in any way binding. It is said that there was no acceptance of the goods, and hence the case is within the statute of frauds. Under our statute, the delivery of goods under a contract of sale, to a common carrier in the usual course of transportation, is sufficient to take the case out of the statute. Code, §§ 3663, 3664. In this respect our statute seems to be different from that of New York, where both delivery and acceptance are required. We think, however, that the evidence shows an acceptance of the tobacco. When the tobacco came to the store, the shipping clerk of the firm was aware of the fact, and knew that the order for it had been countermanded. The firm, with knowledge that the tobacco had been delivered to it, took no steps to return the same, but the next day exercised an unequivocal act of ownership over it by mortgaging it to the defendant trustee. If defendant firm did not consider it their property if they had not accepted it, why did they mortgage it? They thereby undertook to make a disposition of it absolutely inconsistent with any claim that they had not accepted the property. Thus we see that both plaintiff and the defendant firm treated the transaction as a sale and delivery of the tobacco. Under our view, we need not consider the error based on the refusal of the lower court to give instructions asked by plaintiff. They were properly refused. It cannot be doubted that, the tobacco having been shipped in pursuance of an order before that time made, and having been received, accepted, and retained by the defendant firm, said firm are liable to plaintiffs for its value, notwithstanding the attempted countermand of the order, which was never recognized by plaintiff. It is apparent, then, that when the writ was served in this action plaintiffs had no right or title to or interest in the tobacco. The court below properly directed a verdict for the defendant Smith. Affirmed.

HUDSON FURNITURE CO. v. FREED
FURNITURE & CARPET CO.

(36 Pac. 132, 10 Utah, 31.)

Supreme Court of Utah. March 20, 1891.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by the Hudson Furniture Company against the Freed Furniture & Carpet Company for the price of goods sold and delivered. Verdict for plaintiff set aside, and a new trial granted. Plaintiff appeals. Affirmed.

Frank B. Stephens and Benner X. Smith, for appellant. Brown & Henderson, for respondent.

BARTCH, J. This is an action brought to recover the price of goods sold under verbal contract. The jury rendered a verdict in favor of the plaintiff, and thereupon the defendant moved for a new trial. On the hearing of this motion the verdict was set aside, and a new trial granted. From this order, the plaintiff appealed.

It appears from the evidence that plaintiff's agent called upon the defendant, and received his verbal order for the goods in question at the agreed price of \$438.99, the goods to be delivered free on board of cars at Hudson, Wis., consigned to the defendant. No particular railroad or carrier was designated. It further appears that the goods were delivered on board of cars, and shipped to Salt Lake City, in pursuance of said order; that a bill was sent to the defendant; and that thereupon, and before the goods arrived at Salt Lake City, the defendant telegraphed and wrote to the plaintiff, refusing to receive or accept the goods. The respondent contends that this contract was void under the statute of frauds, and that to entitle the plaintiff to recover there must be shown a delivery of the goods by the plaintiff, and an acceptance by the defendant. The appellant insists that the delivery of the goods to the carrier was a receiving of the same by the defendant, and therefore does not fail within the statute of frauds, and that this case is controlled by section 2836, Comp. Laws Utah 1888, which reads as follows: "Every contract for the sale of any goods, chattels, or things in action for the price of three hundred dollars, or over, shall be void, unless: 1. A note or memorandum of such contract be made in writing and subscribed by the parties to be charged therewith. 2. Unless the buyer shall accept or receive part of such goods, or other evidences, or some of them, of such things in action; or 3. Unless the buyer shall at the time pay some part of the purchase money." This law was enacted in 1865, and under its provisions, if the buyer either accepted or received the goods, its terms would appear to be satisfied; and, if this were the only statute affecting this class of contracts, then the only question in this case would be whether the delivery by the seller to a carrier not designated

by the buyer would be a sufficient receiving of the goods on the part of the buyer. Counsel for appellant has cited several cases which appear to hold the affirmative of this proposition under statutes similar to the one under consideration. We do not deem it necessary, however, to pass upon this question, in view of a later law found in section 3918, Comp. Laws Utah 1888, which provides as follows: "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents." Omitting the parts of this section not material in this case, subdivision 4 reads: "An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive a part of the goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money." This law was passed in 1884, and is the latest expression of legislative will on this subject. Under its terms no evidence of an agreement for the sale of goods, the price of which is \$200 or more, can be received, except the writing or secondary evidence of its contents, unless the buyer has accepted and received a part of the goods; and such a contract not in writing is, in its inception, void, and only becomes operative when the buyer has both accepted and received a portion of the goods. This is so because, after an appropriation of the goods as his own, he will not be heard to assail the validity of the contract under which they became his property. Under section 2836, supra, this result appeared to follow whenever the buyer accepted or received a part of the goods. The former statute uses the phrase "accept or receive," the latter "accept and receive." In the former, the conjunction is a connective which marks the alternative, and it would appear that either an acceptance of a part of the goods or a receiving of the same would avoid the operation of the statute. In the latter, the conjunction expresses the relation of addition of; and here to avoid the operation of the statute it must be shown, not only that a part of the goods were accepted, but also that they were actually received. It is clear that the two sections are repugnant to each other in this respect, and, as section 3918 is the latest expression of our legislature, it must prevail; and, in so far as the two statutes are repugnant to each other, the former is repealed by the latter by implication. The fact that the former is not expressly repealed by the latter, and is our regular statute of frauds, as insisted by counsel for appellant, makes no difference. Nor does the fact that the latter is merely a statute of evidence, adopted with the Civil Code, and forming a part of it, change the rule of construction

that, where there is a positive repugnancy between the provisions of two statutes, the former in point of time is repealed by the latter by implication, to the extent of such repugnancy. In so far as the later law is merely auxiliary or affirmative or cumulative, it does not repeal the former. Both statutes must be construed together, and given effect as far as possible, for both are presumed to have been enacted with deliberation, and with a knowledge of all existing laws on that subject. *Suth. St. Const.* §§ 152, 160; *Wood v. U. S.*, 16 Pet. 342; *People v. Board of Sup'rs*, 67 N. Y. 109.

We are of the opinion that, to entitle a person to recover under a contract such as the one under consideration, both an acceptance and a delivery must be shown. Was, then, the delivery to the carrier in this case such a delivery as will satisfy the provision of law expressed in the phrase "accept and receive," or as will avoid the operation of the statute? No part of the purchase money was paid by the buyer, and no note or memorandum of the contract was signed by him. The transaction was made in pursuance of an oral agreement, which was void under the statute, unless the buyer accepted and received a part of the goods. A buyer may receive the goods for the express purpose of ascertaining their quality or fitness for the use intended, and may then refuse to accept them, or he may accept them and yet never receive them. In neither case does he appropriate them to himself and oust the seller of his property in them. Nor does he divest the owner of his lien or of his right of stoppage in transitu. To satisfy the statute there must be such an act, or such conduct, on the part of the buyer, as will manifest an intention to accept and receive the goods as his own,—such an act or such conduct as will supply the place of a written contract. The delivery must be a complete delivery, and the acceptance must be final, unconditional, and irrevocable, so that the goods will be reduced to the actual possession of the buyer. It is not necessary for the accepting and receiving to take place at the same time. One may precede the other, but both must have occurred before the seller is entitled to recover the price; for so long as there is no absolute and final appropriation of the whole or a part of the goods by the buyer, or so long as the contract, by its terms, may be avoided by either party, or so long as either party has a claim, as against the other, upon the subject-matter, or so long as the buyer may object to the quality of the goods, there is no sufficient acceptance, even though the possession of the goods may have been altered. Story, in his work on the Law of Sales (section 276), treating on this subject, says: "The acceptance must be final, complete, and irrevocable, and the subject-matter must have come into the absolute possession of the purchaser, or of some person authorized finally to receive it for him. An acceptance of goods, therefore,

by a carrier or middleman, to take to the purchaser, is not sufficient, unless such carrier or middleman be the authorized general agent of the purchaser, because such a delivery and acceptance would not be final, so as to deprive the seller of his right of stoppage in transitu. It is not, however, necessary that there should be a manual and actual reception of the goods; for if a complete constructive possession be given by symbol, so as finally to bind both parties, or if a final appropriation by the purchaser be necessarily implied from his acts, so as to destroy all right to avoid the sale, or to object to it, or if they be delivered to an agent or bailee authorized finally to accept them, the acceptance will be sufficient. The only question is whether the contract is completely executed on the part of the vendor, and assented to finally by the vendee, so that the right of property and the possession are irrevocably changed." There has been much discussion on this subject by jurists, but the law now appears to be well settled, both in England and in this country, in accordance with the doctrine laid down by this eminent author. Under this broad and explicit exposition of the law it follows that a delivery of goods to a common carrier, pursuant to a verbal contract, for the purpose of transporting them to the buyer, is not a sufficient acceptance, unless such carrier be the agent of the buyer, and has authority finally to accept them for him.

In *Norman v. Phillips*, 14 Mees. & W. 277, *Anderson, B.*, said: "The true rule appears to me to be that acceptance and delivery under the statute of frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods; as, for instance, if, instead of sending the goods back, he keeps or uses them." In *Knight v. Mann*, 118 Mass. 143, the court said: "The clear and unequivocal acts showing an acceptance, or from which an acceptance may be inferred, must relate to some dealing with the property itself by the buyer or his authorized agent, after the delivery of the whole or a part of it." 1 *Reed, St. Frauds*, § 262; *Benj. Sales*, § 139; *Baldev v. Parker*, 2 *Barn. & C.* 37; *Tempest v. Fitzgerald*, 3 *Barn. & Ald.* 680; *Maberley v. Sheppard*, 10 *Bing.* 99; *Carter v. Tousaint*, 5 *Barn. & Ald.* 855; *Smith v. Surman*, 9 *Barn. & C.* 561; *Johnson v. Cottle*, 105 *Mass.* 447; *Rodgers v. Phillips*, 40 *N. Y.* 519; *Cross v. O'Donnell*, 44 *N. Y.* 661; *Grimes v. Van Vechten*, 20 *Mich.* 410; *Taylor v. Mueller*, 30 *Minn.* 343, 15 *N. W.* 413; *Frostburg Manuf'g Co. v. New England Glass Co.*, 9 *Cush.* 115; *Allard v. Greasert*, 61 *N. Y.* 1; *Shepherd v. Pressey*, 32 *N. H.* 49. While it is true that in many cases a delivery to a carrier has been held sufficient to satisfy the statute of frauds, yet in most of those cases it will be found, upon examination, that there was either a prior acceptance of the goods by the buyer, or that the statute provided for an accept-

ance or delivery, or that the carrier was designated by the buyer, and selected by him for the purpose of receiving and accepting the goods. The case at bar must be distinguished from all of these classes of cases, for here the law requires both a receipt and an acceptance, and there was no prior acceptance by the buyer, nor was the carrier designated or selected by him as his agent to accept the goods. The plaintiff delivered the goods to the carrier without any authority except such as was given it by the terms of a void contract, which, being void, could not empower it to do any act which would bind or conclude the defendant. What the plaintiff did is entirely immaterial. The defendant could accept the goods or not, as it chose.

It may be admitted in this case that the plaintiff fully performed its part of the verbal contract, and still the defendant could refuse to accept the goods. It could do this arbitrarily and unreasonably, and without assigning any reasons therefor. The question is not whether the defendant ought to have accepted the goods, but whether it did accept them. 1 Reed, St. Frauds, § 263; Benj. Sales, § 139. We think there was not a sufficient acceptance to satisfy the statute, and the trial court, having proceeded on the theory that the acceptance was sufficient, properly granted a new trial. The order is affirmed.

MINER and SMITH, JJ., concur.

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